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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-5381

MIKE GRANCICH, ARCHIE GALEA,
and FRANK MARTINEZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE

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NO.

MIKE GRANCICH, ARCHIE GALEA, and FRANK MARTINEZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioners, GRANCICH, GALEA and MARTINEZ, respectfully pray for a Writ of Certiorari to the 9th Circuit Court of Appeal to review its judgment affirming their convictions and the imposition of prison sentences.

OPINION BELOW

Trial was by jury. The Opinion affirming the judgments in part is found in Appendix "C".

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

PETITIONERS WERE FALSELY CONVICTED OF VIOLATING THE 1970 AMENDMENT TO THE "HOBBS ACT."

II

THE ENTIRE RECORD DEMONSTRATES THAT THE TRIAL JUDGE WAS NOT AN IMPARTIAL JUDGE REPRESENTING THE IMPERSONAL AUTHORITY OF

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THE LAW BUT WAS AN "ACTIVIST SEEKING COMBAT" WHO VIOLATED THE "NEUTRALITY" OF A TRIAL JUDGE OF CRITICAL IMPORTANCE TO THE FAIRNESS OF A CRIMINAL TRIAL, THEREBY DEPRIVING PETITIONERS OF THEIR RIGHT TO A FAIR TRIAL UNDER THE CONSTITUTION.

III

THE ENTIRE RECORD DEMONSTRATES THAT THE PROSECUTING ATTORNEY FAILED IN HIS DUTIES AS THE REPRESENTATIVE OF THE SOVEREIGNTY WHOSE WORDS ARE BELIEVED BY THE AVERAGE JURY AND WAS GUILTY OF PURPOSEFUL AND FLAGRANTLY PREJUDICIAL MISCONDUCT, THEREBY DEPRIVING PETITIONERS OF THEIR RIGHT TO A FAIR TRIAL UNDER THE CONSTITUTION.

IV

THE EVIDENCE ADDUCED AT TRIAL WAS TOTALLY INSUFFICIENT TO JUSTIFY THE CONVICTIONS OF ANY OF THE PETITIONERS.

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CONSTITUTIONAL PROVISIONS INVOLVED

Involved are the 5th Amendment to the United States Constitution and Article I, Section 9, Clause 3, of the United States Constitution.

STATUTES INVOLVED

Statutes involved are: 18 U.S.C., 1310, 1502, 1503, 1941, 1951, 1962, 4208, 4208 (a)(2); 29 U.S.C. 186 and 187.

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STATEMENT OF THE CASE

Defendants Grancich, Galea, Jayich, Macht, were indicted by the March, 1971, Grand Jury (Indictment No. 10638 CD) in the United States District Court for the Central District of California on a variety of charges relating to conspiracy to engage in prohibiting business activities; interference with interstate commerce, extortionate picketing; and restricting payments to union employees. Also indicted with the above defendants were Frank Martinez, Edward Chacon, Charles Rico and David Santana, who were subsequently acquitted and additional defendants Donald Matthews and Enrico Campanale. The certified copy o of indictment was filed on June 29, 1972, and was a superceding indictment which replaced an earlier indictment (8283-CD) which did not include Defendants Grancich, Matthews, Campanale, or Martinez. (See C.T. 1). After arraignments, pre-trial

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Motions, and continuances for a variety of reasons, the trial commenced before Manuel Real, Federal District Judge, on March 6, 1973. On March 9, 1973, the Government rested it's case (R.T. 977). The defense immediately commenced. After a trial by jury, Defendant Grancich was convicted on Counts 1, 2, 3, and 4 -- and acquitted on Count 5; Defendant Galea, convicted of Counts 1, 2, 3, 4, 5 and 7, and acquitted of Counts 8 and 9 (he was not charged with Count 6; Defendants Chacon, Rico, Jayich and Macht were exonerated in Counts 8 and 9, and convicted on Count 2. (They were charged in no additional Counts). Subsequently, a motion for judgment of acquittal was granted as to both Chacon and Rico. Frank Martinez was found not guilty as was David Santana. Co-Appellants Campanale and Matthews were convicted of Counts 1, 5, 6 (they were not charged in the other Counts.)

Just prior to trial, an indictment with

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case number 11933 charging defendants Galea and Martinez with violating 18 U.S.C. Section 1503 was consolidated with the indictment number 10638 for trial. Although the Court indicated he was inclined to dismiss the indictment, he subsequently, for some reason, changed his mind, and both defendants were convicted.

After denying counsel's motions for a new trial, (Rule 33), and in arrest of judgment (Rule 34((R.T. 2275), the defendants were sentenced on April 11, 1973, before and by Judge Real. (R.T. 2265-2298). The Court sentenced Defendant Grancich to a term of four years on Count 1, five years on Count 2, with the condition that the first six months of the five year term be spent in confinement. The balance of the five year term was suspended and the defendant was placed on probation for a period of five years. As to Counts 3 and 4, he received a sentence of one year on each to run concurrently and not

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consecutively to the sentences imposed on Counts 1 and 2. The sentence on Count 2 was ordered to run consecutive with the sentence on Count 1. The sentence was imposed pursuant to the provisions of 18 U.S.C. Section 4208 (a)(2).

As to Defendant Galea, the Court sentenced him to a period of four years on Count 1 and five years on Count 2. As in the case of Defendant Grancich, on Count 2 it was ordered that the first six months of the five year term be spent in an institution with the balance of the term suspended and Galea placed on probation for a period of five years. As to Counts 3 and 4, Galea was sentenced to one year on each count to run concurrently with the sentences imposed on Counts 1 and 2. The sentence on Count 2 was ordered to run consecutively with the sentence imposed on Count 1. As to Counts 5 and 7, the imposition of sentence was suspended with the defendant

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being placed on probation for a period of five years and the sentence on Bounts 5 and 7 was ordered to run concurrently with the sentence on Count 2 but consecutively with the sentence on Count 1. Defendant Galea's sentences were also made subject to 18 U.S.C. 4208 (a)(2). Co-Defendant Matthews was sentenced to four years on Count 1 and five years on Count 5 and five years on Count 6. The Court further ordered that Matthews spend the first six months of his five year term in custody and be sentenced to probation for five years also. The sentences on Counts 5 and 6 were ordered to run concurrently with each other but consequtive with the sentence on Count 1. The Court then sentenced Defendant Enrico Campanale. He was sentenced to four years on Count 1 and five years on each of Counts 5 and 6. As to Counts 5 and 6, it was adjudged that he be confined for the first six months in a jail type institution with

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the balance of said term to be served on probation. The sentences on Counts 5 and 6 were adjudged to run concurrently with each other, but consecutively with the sentence imposed in Count 1. He, too, was sentenced under 18 U.S.C. 4208.

Defendant Jayich was sentenced to a term of five years on Count 2, and that sentence was suspended and he was placed on probation for a period of five years on the condition that he serve the first 50 days of the five year term in a jail-type institution. The sentence also provided for weekends in jail and was also subject to 18 U.S.C. 4208 (a)(2). Defendant Peter Macht received the identical sentence as Anthony Jayich.

Frank Martinez was sentenced to a term of four years in prison -- and that term of imprisonment was made subject to Title 18 U.S.C. 4208 (a)(2). As for Defendant Archie Galea, in case nunber 11933, he

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received a four year sentence to run concurrently with his sentences in case number 10638. Notices of Appeal were filed for all defendants and bond was set as follows:

> Each defendant was released on a $5,000 corporate surety bond or $5,000 third party property surety with a 10% deposit.

The original indictment (Number 8283-CD) was dismissed by the Court.

In its opinion of June 4, 1975, the 9th Circuit Court of Appeals reversed the convictions of Defendants Macht and Jayich and reversed the conspiracy conviction on Count 2 as to all defendants. Furthermore, while critical of the trial judge, it decided there was enough evidence to overcome his judicial intemperance (See Exhibit "C") A Petition for Rehearing was denied on September 2, 1975 (See Exhibit "D").

All defendants are presently on bond with the exception of Mr. Campanale and the

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cases are properly before this Court under 28 U.S.C. Section 1254 (1).

STATEMENT OF FACTS

The Government called as its first witness Robert Fox, President of Food Employers Council, a non-profit association of employers in several segments of the food industry in the State of California. It serves those employers in labor relations capacity, represents them as a matter of fact in their negotiations and dealing with the various unions that have organized those employers (R.T. 125). On direct examination he testified that he was not sure, but that he may have been offered remuneration by Mike Grancich, Secretary-Treasurer of Local 626, if Fox would urge members of his organization to use a particular loading company (R.T. 129-30).

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On cross-examination Mr. Fox admitted that he never reported Grancich's offer to the police and that he wasn't sure whether Grancich was serious or jesting. He further testified that he never got any bribe money from anyone in Local 626 and does not know of anyone who did (R.T. 138-40).

The next witnesses, Howard Choe, Homer Baird Robinson, and Sol Kramer, all testified as to their use of Pronto Unloading Service, which was owned by six partners, Don Matthews, Enrico Campanale, Bob Dougherty, Sal Sanchez, Ray Ramirez and Fred Shelly.

The next five witnesses, Choe, Robinson, Sol Kramer, Frank Ryan, and Ernest Hughes, testified that they were urged by Defendant Archie Galea to use Pronto Unloading Service. They further testified that, although they had to use more men, the service improved in some areas. Mr. Kramer

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testified about problems with men not showing up on time. His complaints to Galea or Joe Loya would often help, although the problem still continued. (R.T. 177-88). On cross-examination, Mr. Kramer also testified that he was threatened with labor problems, if he didn't get his son-in-law off the union's back, which was stricken as hearsay information imparted by his son-in-law (R.T. 187).

The next witness, Irving Gronsky, President of Gold Pack Meat Company, testified that he had a picket problem arising out of a dispute supposedly stemming from a secondary boycott by the Retail Clerks Union. His plant was shut down and he asked Archie Galea and Mike Grancich for help. The next day the picket line was gone, but then Archie Galea came into his office and asked for $1,500, which he paid. After a similar work-stoppage in 1971, Don Prayzich from the Food Employers Council

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(the employers representative) told him he could avoid such problems if he rehired Pronto Unloading. On cross-examination Mr. Gronsky had no record of the pay-off, no witnesses and admitted he had no discussion about the alleged pay-off with Mike Grancich. The payment he conceded was prompted by a call from Joseph Goldstein, Manager of Quality Meat Packing, who had also been at the previous meeting with Gronsky, Grancich and Galea (R.T. 194-209).

Mr. Gronsky was followed by Don Paryzich from the Food Employers Council, who testified about being called by Mr. Gronsky regarding a work-stoppage in December, 1970. (R.T. 214-15). The particular problem, as testified to by Mr. Prayzich, was due to various changes made by Mr. Gronsky following the Retail Clerk's picket in 1969. Two of the changes had to do with the discontinuance of a coffee service, and of an unloading service company. The Union objected to

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both of these changes, espectially since both of them were union and had provided good service, especially the coffee service truck (R.T. 215-16). The unloading service mentioned was Pronto Unloading. After the services were restored the work-stoppage ended (R.T. 218).

The Government next called Joseph Goldstein, who gave testimony about the alleged payment demanded by Archie Galea in 1969. According to Mr. Goldstein, Archie said that if he did not pay up, he would put the picket line back on (R.T. 220-21). Mr. Goldstein further testified that he argued the price down, since he told Galea that his operation was not as big as Gronsky's. (R.T. 227).

On cross-examination by the defense, Mr. Goldstein admitted that he had not paid the full amount asked previously by Galea. He testified that he only really paid about $800 - $900. (R.T. 231-32).

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The Government then called Robert Dougherty. On direct examination Mr. Dougherty gave testimony that he formerly had his own business, Service Swampers, which he started in 1966. This was an unloading service, which he operated until late 1968, when he was allegedly put out of business by the Teamsters. Prior to this in early or mod-1968, he had been approached by Don Matthews, a partner in Pronto Unloading, to come and work for him (R.T. 237-41).

Mr. Dougherty then testified that he offered Archie Galea $2,000, if he would let him stay in business on his own (R.T. 234-44). Mr. Galea, according to the witness, said that it was out of his hands (R.T. 244). Mr. Galea never solicited, nor was ever paid the money.

In further testimony, Mr. Dougherty stated that at a meeting held in Barney's Restaurant in the City of Vernon, the partners were apprehensive about his coming

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in as a partner. At the same meeting Archie Galea outlined a plan for Pronto Unloading to get a monoply of unloading work in Los Angeles to reduce the friction, competition and unpredictability of the present predicament. The plan called for the Teamsters to work hand in hand with Pronto and also being paid a sum of $500 a week for any possible union infractions. Any unloading done by non-union personnel would be handled by Archie and the Teamsters. (R.T. 245-51). Mr. Dougherty further testified that the Teamsters intended to put Fred Blea out of business, but would leave Eddie Martinez alone provided that he pay them $50 a week (R.T. 250-51). Mr. Dougherty joined Pronto the following Monday after the meeting at Barney's Restaurant, and was assigned by Don Matthews to dispatching employees and watching over money and records. (R.T. 252, 254-56).

According to Mr. Dougherty, at a

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subsequent meeting Don Matthews introduced the union contract and told Dougherty not to contact employees, most of whom were illegally in the country, so they would not know about benefits due them. He stated that the company did not follow rules on union deductions, allowed no leave, holidays off, and never bought health insurance for employees. (R.T. 256-57). In further testimony Mr. Dougherty stated that Pronto paid $500 a week to union officials and Galea offered to get the company more contracts at Choe and High Standard, if the pay-offs were increased. (R.T. 269-71). These pay-offs started in late 1968 and continued until Mr. Dougherty left in April, 1972.

Mr. Dougherty also testified that he was paying Don Matthews $50 a week prior to becoming a partner in 1968. He also testified as to a payment of $500 to Archia Galea regarding an account at Luck's Market in Buena Park (R.T. 278-80).

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Also in January, 1971, allegedly Archie Galea came into the office and told the other partners that they could take money from the company fund, since he and Matthews had been doing it for some time (R.T. 282). Finally Mr. Dougherty testified that in a meeting with Grancich, arranged by Lake Headley, the defense investigator, he (Grancich) claimed neither he or his men had taken pay-offs and told Dougherty that if he falsely accused them, he would be "taken care of". This meeting was held about a week before Dougherty was due to testify before the Grand Jury in May of 1972. Further, Mr. Dougherty alleged that he was told by Lake Headley and Mike Grancich that if "he didn't remember anything" he could simply state that he just could not remember. This supposedly was to be part of his testimony before the grand jury. In exchange for his testimony, Dougherty surmised he would be given union cooperation in contracts with other packing

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companies. Shortly after testifying before the Grand Jury and the Teamster Officials were indicted, Dougherty was out of business (R.T. 283-99).

On cross-examination, Mr. Dougherty testified that he actually never saw Mike Grancich or Archie Galea receiving any money (R.T. 305).

Mr. Dougherty testified that at a prior meeting held in Attorney Luke McKissack's office, in the presence of witnesses, he lied about not having any firsthand knowledge about Archie Galea receiving money from Don Matthews. In testimony before the Grand Jury, however, he told the truth and admitted being a witness to the event (R.T. 305, 321-22). Mr. Dougherty went on to say that Archie Galea once came down to the Pronto office and admitted receiving such payments in the presence of some of the partners, Fred Shelley, Sol Sanchez, Ray Ramirez and Enrico Campanale.

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In questioning about alleged car payments made by Pronto Unloading in behalf of Archie Galea, Mr. Dougherty stated that Don Matthews came into the office one day and said, "this guy is getting heavy, man, now he wants a car". According to Dougherty, he and Don Matthews took the car (a VW) out to Galea's house; at least twelve payments were made by Pronto (R.T. 323-24). This he admitted was second-hand information as it was told to him by Don Matthews. (R.T. 324).

On further cross-examination by the defense regarding alleged payments made to Archie Galea or himself, Mr. Dougherty admitted that one of the reasons for attempting to contact Mike Grancich was to talk to him about his staying in business (R.T. 332). At that meeting he agreed that he would tell the Grand Jury that he had never seen payments made to either Galea or Grancich. However, before the Grand Jury he reversed himself as to Galea.

Finally Mr. Dougherty admitted there

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was some antagonism between himself and the Teamsters; the fact that he was out of the unloading business, and in the process of losing his house was a direct result of his being blackballed by the Teamsters. Also, he admitted having put up $4,000 for one Mike Glattner to run against the Teamsters in a Local 626 election. (R.T. 341).

The Government next called Helen Taylor, the Bookkeeper at Pronto Unloading, who gave testimony that she made out weekly checks from about March, 1969, to January, 1970, in various amounts ranging from $450 to $1,000 either made payable to cash or to Don Matthews. This was done on instructions by Matthews (R.T. 530-553)* Mrs. Taylor testified that she made the usual deductions, although she only remembers making union deduction once during the time she was

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*Due to a lack of cohesion between the Daily Trial Transcript and the finalized version, it is necessary to pick up the pagination in Volume 4 at this juncture.

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employed by Pronto. (R.T. 536). Also, at the same time Mrs. Taylor testified that loose cash which came in from services rendered by Pronto were recorded, and deposited in the bank. Some of the money was not deposited, however, and she would take about $600 each week and place it in a blank envelope at the directions of either Mr. Matthews or Mr. Campanale. (R.T. 534).

On cross-examination Mrs. Taylor testified that she made out checks payable to Local 626 for union dues. (R.T. 541).

Mr. Arnold Geffner, the accountant for Pronto Unloading, followed as a witness for the Government and gave testimony about an unusual transaction involving checks made payable to Don Matthews. Mr. Geffner testified that he discussed the checks with Matthews and told him that he would have to account to the IRS to what they were spent for. According to Mr. Geffner, no more checks were made after that (R.T. 546, 547).

The Government's next witness, George

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McEwan, President of Southwest Administrators testified that, although an account had been opened by Pronto Unloading Service on behalf of Local 626 employees, there were no records since they (Pronto) stated that they never had any eligible employees (R.T. 551).

The Government next called Manuel Valdez, who formerly operated a loading service in the City of Vernon. He testified about a meeting with Mike Grancich and Don Matthews held in the summer of 1968 at the Ville Bosque Restaurant in Vernon. Before this meeting, according to Valdez's testimony, Don Matthews put some money ($300-$500) in an envelope and handed it to Mike Grancich, who happened to be at the restaurant. (R.T.554).

On cross-examination, Mr. Valdez admitted he was a bit hazy on the dates but claimed that the meeting took place in the summer of 1968 thereabouts. Also he admitted that in 1971 he was in jail for possession of heroin. The defense attempted to pursue this line of questioning, but the Judge

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stopped it. (R.T. 570).

Mr. Valdez was followed by Jesus Lopez Palma, who testified that he had never been asked to sign any authorization for union dues deductions. He worked for about eight months for Pronto Unloading (R.T. 574).

The next Government witness, Jesus Villamonte Vargas, testified that he worked for Pronto Unloading at least four months beginning in September, 1972. He gave testimony that he was not allowed to join the union. He also said that he was injured and had to borrow money from Enrico Campanale to pay for his medical bills. Nobody at Pronto mentioned anything about medical insurance or any type coverate (R.T. 582-583).

On cross-examination Mr. Vargas testified that he had never seen any sign advising employees where to report in case of injury. Further, he testified that the money loaned by Campanale was taken out of his last two checks when he was fired by Campanale early

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in 1973 (R.T. 592).

The next Government witness was Gilbert Rodriguez, who formerly operated Reliable Loading and Unloading. Due to being unable to obtain a contract with Local 626, he went out of business (R.T. 594, 595, 596).

The next Government witness was Mr. Sam Cohen who hired Fred Shelley after Pronto Unloading was unable to provide proper service at his company, Service Packing Company. He hired him after he supposedly obtained his union card (R.T. 600-604).

On cross-examination, Mr. Cohen testified that he had never been threatened by anyone from Local 626.

Mr. Fred Shelley was the next Government witness. He testified that he was approached by Archie Galea (in June of 1972) by Archie Galea and Frank Martinez, to fire Bob Dougherty or cease from unloading (R.T. 611).

On cross-examination, the defense was not allowed to pursue the immunity from

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prosecution theory in which Mr. Shelley had given prior testimony before the Grand Jury in June, 1972. The question raised by the defense was whether the witness knew he was not going to be prosecuted at any time after June, 1972.

The background for the picketing was established by the defense at this point. Defense attorney McKissack elicited that Robert Ruchti II was in business with other members of his family running a meat concern. A wage claim against him drove him temporarily out of business, but he came back with another business using the same stationary to send out letters to continue in business (R.T. 623). The union set up the picket line because they thought they were entitled to back wages.

The Government next called Robert Ruchti II, who gave testimony about being involved on April 28th, 29th, 30th of 1971 in a confrontation with the defendants at the Black Angus Cattle Company where they were being

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verbally threatened by some members of Teamster Local 626. Allegedly at the same time there was a picket line at the establishment whih- was manned by business agents from the Butchers Union and the Teamsters.

Prior to this incident at the Black Angus, Mr. Ruchti testified that two of his workers Joe Soda and Bill Day went to Gold Ring Packing Company to pick up merchandise. Peter Macht from the Teamsters followed them and told the dock foreman that he would shut down Gold Ring, if he sold to them (R.T. 627). Peter Macht then advised Ruchti that if he wanted to do business in California to go see Mike Grancich.

Ruchti went into detail as to how he attempted to buy meat but was constantly harassed by Galea and some of the other business agents. According to his testimony, they would follow him from place to place and on the streets and freeways of the city. Also allegedly at this point Archie Galea demanded payment of $30,000 (R.T. 628, 635,

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637). Mr. Ruchti then identified the business agents who had spposedly been harassing him. Archie Galea, Dave Santana, Tony Jayich, Peter Macht, Ed Chacon, and Charley Rico, who were present in the courtroom. (R.T. 638).

At this point in the proceedings there was extensive arguments between the defense, prosecution and the Court as to the scope of the cross-examination. The defense sought to establish the theory that the union's purpose or objective in picketing Ruchti stemmed from the back-wages that they felt were still owed and had never been settled either by the labor commissioner or by the NLRB. Also, that the Plaintiff Ruchti had attempted to escape this liability by going out of business, and then coming back to run the same type of operation. This the defense claimed was an unfair labor practice, and that picketing Ruchti was certainly no federal crime. Also, the issue of back-wages had never been settled and could not

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be limited by the Court, since Ruchti had already testified as to the $30,000 demanded by both unions (R.T. 655-660).

The Court did not think this was relevant and attempted to limit the scope of cross-examination to the three days involving the incident at the Black Angus Cattle Company (R.T. 660-661). The prosecution agrees with the Court as to the scope of cross-examination and argued that the misstatements about the successor corporation were not relevant because the size of the business was entirely different; that there was no packing or slaughtering as before. The only similarities they argued were that it happened to involve the meat business; the use of trucks to deliver and pickup meat and stationary and the trucks bore the same logos as formerly (R.T. 663). They argued that Ruchti was merely peddling meat instead of slaughtering and packing it. (R.T. 663).

The Court at this point refused to go

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into the question of successor corporation. He ruled that there was insufficient evidence. The defense argued that they were ready to put on witnesses and evidence that would prove the defense theory. (R.T. 667-668). The defense argued that Mr. Ruchti had laid the foundation by talking about the Teamsters being there and picketing. (R.T. 669).

On cross-examination Mr. Ruchti then continued to give testimony that on April 29th, after attempting to see Mike Grancich at the Teamster Building on 9th Street in Los Angeles, he returned to the Black Angus Cattle Company. Upon arrival there he was met by Dave Santana and Archie Galea. At this point he again repeated his earlier testimony that Archie demanded $30,000 for himself and Dave Santana.

At this point the defense introduced a copy of the testimony given before the Grand Jury by Mr. Ruchti some two weeks after the April, 1971, incident at Black Angus. In the

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Grand Jury testimony Mr. Ruchti testified that one of his employees, Joe Seda, talked to one of the business agents and asked him what the $30,000 was for. The agent told Mr. Joe Seda that it was to be divided between the two unions. At least $17,000 would go to the Teamsters and $14,000 to the Butchers. Mr. Ruchti then further testified before the Grand Jury that when Archie spoke to him he said it was going to be split fifty-fifty between Dave Santana and him. "I would imagine meaning the unions, I don't know". (R.T. 727).

The Court then ruled that it was not, however, impeachment of the witness' testimony. Also, the Court refused to let the defense get into questioning about a pending back-wage claim made by Kenneth Bauman, a butcher. (R.T. 731-732).

On further cross-examination the defense established that Archie Galea had in fact told Mr. Ruchti what the $30,000 was for. The witness admitted that he had so testified

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before the Grand Jury (R.T. 740-741).

The defense attempted to bring out any antagonism demonstrated in his action by Mr. Ruchti against the defendant Archie Galea. He testified that he had no animosity against Mr. Galea. Also that he never threatened "to get rid of Archie Galea". (R.T. 757, 769). Further, whether he had ever pulled a gun on defendant Frank Martinez (R.T. 760). Mr. Ruchti testified that he had only done so in self-defense after Mr. Martinez had followed him in his car and blocked him into an alley.

The Court refused to let the defense get into questioning into attempts made by the Teamsters Union to discuss the wage-claims made against Ruchti. (R.T. 762-763).

The defense also questioned Mr. Ruchti as to whether he had ever threatened Andrea Brannon to keep quiet about the wage-claims. An objection was sustained here. (R.T. 767).

On recross-examination the Court refused to allow the defense to pursue the identity

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or ownership of the trucks as to whether they still belong to Ruchti Brothers or Ruchti Transport Company. (R.T. 776).

The Government next called William Wallace Day, who testified to the events on April 28, 29 and 30th. According to his testimony, the Teamster business agents, defendants in this case, followed them wherever they went. On the 28th he observed a picket line forming outside the Black Angus Cattle Company and was present when Ruchti had the heated argument with Galea over the payment of $30,000. He testified that some members of the Teamsters threatened physical violence to his person and prevented them from leaving the premises on the 29th when they attempted to commit an assault by using a battering ram to knock down the door (R.T. 781-800). Also, that the Teamsters prevented any of the out-of-state trucks to make their deliveries. Mr. Day also stated that the Teamsters followed them when they talked to the Lynwood Police

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Chief and the FBI (R.T. 781-800).

On cross-examination by Mr. Fishman for the Defendant Dave Santana, Mr. Day testified that he never actually saw him carrying a picket sign, he did bea on the door and he didn't ask Mr. Ruchti for money (R.T. 803-804).

The Government next called Don Bunte, who rented the Black Angus locker space to Mr. Ruchti. According to his testimony he was present when Galea demanded the $30,000 from Ruchti (R.T. 831). Also, he was cussed at and threatened with closing of his business by Galea (R.T. 828).

On cross-examination Mr. Bunte admitted that he had only told the Grand Jury that he had seen one person picketing for ten minutes on only one of the days (R.T. 843).

The next Government witness was Eddie Martinez, who testified that he made protection payments to Enrico Campanale and Don Matthews from August, 1968, to March of 1972. The payments were of $50 a week amounts,

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totalling up to almost $8,000 during the period (R.T. 845-855).

On cross-examination Mr. Martinez admitted that he had often borrowed money from Mr. Campanale and at one time was trying to obtain a packing house for his son, Randy Martinez.

Mr. Martinez' son, Randy, followed him on the witness stand and he testified that he often made the payments to Don Matthews and Enrico Campanale (R.T. 877).

The next Government witness was Charles Sproul, who also made payments to Enrico Campanale at the instructions of Eddie Martinez (R.T. 886).

On cross-examination he testified that Eddie Martinez once told him that it was a loan he was paying back to Campanale (R.T. 887).

The Government next introduced Stanley Currey, an FBI Agent, who took photographs of Charles Sproul, allegedly making payments to Enrico Campanale (R.T. 890-893).

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Mr. Currey was followed by Ricardo Rodarte, who testified that he and his partner, Fred Blea, were told by Campanale and Matthews that they would have to make $50 a week payments in order to stay in business. (R.T. 898-899). Also, that after falling behind in their payments they made out a check for such outstanding amount to Don Matthews and handed it instead to Archie Galea (R.T. 903). He further testified that the payments were made for a period of a year and they were forced out of business (R.T. 905).

On cross-examination Mr. Rodarte stated that Don Matthews and others were present when Galea put the check in his pocket. Also that the check stubs from the payments were lost in his car, stolen in 1969. He never produced them.

The next two Government witnesses testified to the handwriting on the Fred Blea checks endorsed by Don Matthews (R.T. 921-929).

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The Government then called Fred Blea, who formerly operated a loading service in Vernon, and allegedly was driven out of business after he refused to make any more payments to Don Matthews and Enrico Campanale . He also gave testimony about the last payment made to Archie Galea, and a telephone conversation he had with Mike Grancich where he told him to get his stooges "off my back". Archie Galea was on the other line, according to Blea, and cussed back at him, "you can't call me a stooge". (R.T. 939).

On cross-examination the defense had to extablish whether Galea made the "stooge" comment before Mike Grancich told Blea he was out of business. (R.T. 943-944).

The Court rules that the line of questioning as to which part of the conversation took place first was not important, since it was said anyway (R.T. 948-949). Also, that the cross-examination regarding prior felony convictions was likewise not relevant as

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being too remote in time (R.T. 970).

Following the cross-examination by the defense, the Government rested its case (R.T. 918).

The defense then introduced motions to dismiss the counts against Defendant Frank Martinez and Mike Grancich on the grounds of insufficient evidence (R.T. 983-984). Also, the only witness against Mr. Grancich, Mr. Valdez, placed the alleged payment in 1968. The particular statute did not go into effect until October of 1970 (R.T. 986).

The defense further commented that there was an over-restriction when they attempted to probe into the situation about the prior debts owed to members of the Teamsters. (R.T. 990-991).

The Court, however, felt that the settlement by the NLRB merged all of the facts into the judgment. The Court stated again that this couldn't be brought out through cross-examination by Mr. Ruchti.

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At this point, after the Government had rested its case, there was a long discussion on the fact that the defense had not been properly notified that the Government was going to rest its case. The Court did not feel this was true since the case had been pending for a while. The defense in the person of Mr. Nizinski, stated that they had not "anticipated" the People's case ending so early. The Court admonished Mr. Nizinski by saying, "don't give me this anticipation business," (R.T. 1017-1032). Further, Mr. Nizinski felt that they were being pressured by the Court to proceed, since they had been trying to subpoena witnesses and trying to find out who the Government was going to have testify. The Court responded that the defense had had nine months to prepare this case, so there was not any pressure being applied (R.T. 1033-1034).

Counsel for Defendant Santana in his opening statement stated that he would attempt

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to prove that he was there for a legitimate purpose; that there was no picketing conducted by him and that there was a back-wage claim pending against Ruchti Brothers, whichever name they chose to use. Further, he intended to prove that there never was any purpose to enrich his person and he was merely acting as an observer upon instructions from his union (R.T. 1035-1044).

The Defendants Grancich, Galea, Martinez, Jayich, etc. told the jury that there were two phases of their defense they would attempt to prove. The first phase dealt with the Teamsters and Butchers Unions, and their dealings with Robert Ruchti. The defense would attempt to prove that the unions did have a legitimate claim against Ruchti, that the business agents were merely out trying to recover what they believed to be theirs. That the Union did not believe that Ruchti had gone out of business and as far as they were concerned this was the same individual who had previously refused to settle the claim.

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In their belief the Unions would prove that the picketing at the Black Angus Cattle Company on April 28th, 29th and 30th, 1971, was legitimate.

In the Pronto phase of the defense, the defense sought to show that Defendant Grancich had never received any money from Don Matthews or anyone at Pronto. Also, that the conversation between Grancich and Dougherty had been initiated by Dougherty after numerous calls to the defense attorney in attempting to set up such a meeting.

Also, the defense would show in behalf of Mr. Martinez that the only reason he was present was because he had happened to be at several meetings where alleged conversations took place. Also that most of the animosity that occurred between defendants and the witness was due to the condition existing between union and non-union personnel and the owners of the packing companies (R.T. 1044-1074).

On behalf of Campanale and Matthews,

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the defense would attempt to prove that they were in the business of unloading and had attempted to bring the services together in order to prevent the fighting that had been going on for years (R.T. 1075-1079). Also that the monies allegedly paid to Matthews and Campanale did not go into their own pocket, but into other company business.

The defense next introduced its witness.

On direct examination, the witness, Prayzich, was not allowed to answer any of the questions tying Ruchti II with the alleged back-wages claim. The Court and Prosecution argued that the witness could not testify to this, since he had not represented Ruchti II in the dispute. The entity represented was Ruchti Brothers. The defense agreed that the witness had been dealing with Ruchti II so there was a relationship as to the claim made by the union, since Ruchti II had been representing the company during this time (R.T. 1081-1094).

The next witness, Attorney George Pappy,

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testified that he had conversations with Ruchti II regarding the picket line at Black Angus. Also, on questioning on the jurisdiction of the NLRB, the witness testified as to the power of the NLRB in making judgments. In his testimony he stated that the NLRB has no jurisdiction to enforce the judgments, but rather the courts have to enforce the agency's ruling. Mr. Pappy testified that the NLRB deals with unfair labor practices; back-wages are a matter for the courts to decide, but only after the NLRB had given its judgment (R.T. 1103-1105).

The defense's next witness was William Hughes, who testified as to using both Eddie Martinez and Pronto in unloading at his place of business. He had no problem with either one. (R.T. 1109-1116). In further testimony (R.T. 112301125) upon being recalled he was questioned as to alleged statements made by Mr. Eddie Martinez about "taking over the whole ...". The objection to the question

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was sustained however.

Following Mr. Hughes was Richard Frost, who verified a sales contract signed by Archie Galea for a 1969 VW Carmen Ghia. A question into who financed the car was objected to and sustained (R.T. 1120-1121).

The defense attempted to question Jesus Villamonte Vargas as to the fact of whether he had signed any documents while working at Pronto. He had previously testified that he had not. The court, however, ruled this was a collateral matter and not in issue (R.T. 1131).

The next witness, FBI Agent William Fleming, gave testimony that Mr. Eddie Martinez told him about loans and payments made to Enrico Campanale and Don Matthews (1133-1137).

On cross-examination by the defense, Mr. Fleming testified that he had subsequent telephone conversations with Mr. Eddie Martinez wherein he stated that he had been approached by Enrico Campanale and that he

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should tell the FBI that the protection payments were just loans that he was paying off. (R.T. 1129). Also, that he (Martinez) had lied about borrowing $1,500 from Campanale because he was afraid for his family (R.T. 1140).

David Santana followed as the defense's next witness. Mr. Santana testified as to the back-wage claims made by the Butcher's Union against Ruchti Brothers, and the meetings he and Archie Galea had with Don Prayzich representing Ruchti (R.T. 1142-1167).

In further testimony Santana testified that he was approached by members of the Teamsters as to the fact that Ruchti was attempting to operate his business anew. This was a couple of days prior to April 28th, 29th and 30th, Mr. Santana testified as to the confrontation between Ruchti and Galea and the statements made by both parties. He stated that as far as his state of mind was concerned, the $30,000 payment demanded

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by Archie Galea was for the benefit of both the Butcher's and Teamster Union (R.T. 1169-1175).

On cross-examination Mr. Santana was asked if the wage-claims were still pending. According to him, the Food Employers had agreed that a payment would be made, but then Ruchti reneged on the agreement and no payments had yet been made (R.T. 1192-1193).

The defense next called Investigator Lake Headley, who gave testimony on meeting Bob Dougherty and the conversation held in Mike Grancich's office with Frank Martinez being present. Further, he testified that Mr. Dougherty had contacted him on several occasions and had told him that he was possibly going to be granted transactional immunity along with Fred Shelley, if he testified before the Grand Jury (R.T. 1206-1207). According to Mr. Headley, there was no mention by either he or Mike Grancich about Mr. Dougherty perjuring himself before the Grand Jury. He was merely urged to tell

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the truth (R.T. 1213-1214).

Mr. Jose Seda Ruiz then followed for the defense and gave testimony on the April 28th, 29th and 30th, 1971, indicent where he was inside the locker and other members of the Teamsters were outside banging on the door (R.T. 1228-1230). Also as to the confrontation held between Galea and Ruchti on the $30,000 back-wage claim.

The next three witnesses called by the defense testified to back-wages owed to them by Ruchti Bros. They filed their claims through the Labor Commissioners. The witnesses were Ben Diehl, Jerome Jaymes and Bosley Armstrong, none of whom had to date heard anything on their claims (R.T. 1242-1258).

The next defense witness, Archie Galea, gave testimony as to his previous dealings with Robert Ruchti II. At this point defense attorney McKissack attempted to inquire as to the successor corporation now operating at the Black Angus Cattle Co. The Court refused

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to allow this line of questioning, however, there was a dispute as to whether labor leaders were required to know the procedure in handling a labor law isolation. The Court said yes; the defense thought otherwise. The defense is trying to bring out that the fact that there was a successor corporation gives credence to the Union's allegation of back-wages due some of their members, and was crucial on the question of criminal intent. Also that the demand made by Galea for the $30,000 was not for his personal gain; and his state of mind at the time of the April, 1971, incident that these claims had not been settled (R.T. 1273-1275).

The Court at this point got into a dispute with Galea's defense attorney as to whether Mr. Galea was bound by the judgment handed down by the NLRB. The Court again said he was and the defense argued that he was not, much less criminally culpable (R.T. 1276).

The defense further argued that this

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was a matter for the jury ot decide. The Court agreed (R.T. 1277).

The witness went on to testify about the operations of Ruchti Bros. and the type of organization they had operated before. He pointed out the various techniques employed by the corporation, i.e., they would go out of business and refuse to pay the workers. Also, he mentioned the picket line set-up which was manned mostly by business agents and who followed Ruchti and his drivers primarily to see what kind of operation they were setting up (R.T. 1283-1289). Galea also gave testimony about the type of operation that existed in Vernon; i.e. fighting, people pulling guns and meat hooks on each other, etc. (R.T. 1291). Archie Galea also testified why the Teamsters wanted to unionize the workers. According to his testimony, the packers were getting away with "slave labor" in that they would hire workers and keep them waiting around for 12-16 hours and then maybe work them

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for 2-4 hours and pay them $4.00 - $6.00 a day (R.T. 1295).

Also, he gave testimony about the phone conversation with Fred Blea and Mike Grancich where supposedly there were some heated words exchanged between Galea and Blea (R.T. 1300). He also disputed the cash payment allegedly given to him by Blea and Rodarte with Don Matthews being present. He also disputed that Mr. Gronsky gave him money, and that Pronto Unloading ever made any car payments in his behalf (R.T. 1302, 1305). He further disputed the cash payments allegedly made by members of Pronto Unloading (R.T. 1306). Mr. Galea proceeded to testify about various contracts that he signed or negotiated with both Sam Cohen and Fred Shelley. He also stated that he told Shelley that he didn't care for Bob Dougherty, who was Shelley's partner (R.T. 1310-1318).

On cross-examination by Mr. Nizinski for the defense, Mr. Galea testified as to his original approach to some of the loading

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services, the problems he encountered and the opposition he received from both the unloading services and the meat packers (R.T. 1318-1326). Also as to the system used by the companies to collect the union dues (R.T. 1326-1328).

On cross-examination by the Government, Mr. Galea testified that he discussed the picketing with George Pappy prior to setting it up at the Black Angus Cattle Co. He also stated that Pappy told him it was within his rights to set-up the picket (R.T. 1334-1337). The right to picket, according to Mr. Galea derived from the fact that the wages were still owed to the Teamsters and Teamster functions were still being performed (R.T. 1338-1340).

Mr. Galea then testified as to the size of operation of Ruchti, i.e., the number of drivers, employees, and the area of the plant. (R.T. 1350-1353). Then he gave his version of the confrontation with Bob Ruchti II and

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his demand for the $30,000 in back wages owed to both the Butcher's and Teamster's Union (R.T. 1356-1358). Also, there was further testimony as to the work-stoppage at Gronsky's plant where the coffee service and loading service had been replaced (R.T. 1359-1363).

He testified concerning the conversation with Joe Goldstein and the problems he was having with the Retail Clerk's Union (R.T. 1371-1372).

Mr. Galea then was cross-examined as to his function in the implementation of the union contract regarding health and welfare payments. He testified that in his daily visits from plant to plant he would receive complaints on various things that the memebers were upset about. He would try to investigate and settle with the owners or members whenever necessary. He had been informed by the Southwest Administrators that Pronto Unloading was not making any

payments. Upon checking this out with the Pronto Management, he was told that there were no employees who were eligible, since most of them were not around long enough.

On re-direct examination Mr. Galea testified as to the grudges held against him by both Goldstein and Gronsky. The former because members of the Teamsters had stopped his son, who was operating a non-union truck, and had cussed and shouted at him. The latter because of the number of times he had been shut down by the Teamsters (R.T. 1401).

At this point, the Court went into extensive questioning of the witness in regard to any settlement of the back-wage claims. The witness testified in response to the Court's question that there was no mention of such proceeding before the NLRB during the confrontation with Ruchti on April 28, 29 or 30th. The Court went on to question the witness as to whether he had made any investigation with either George

Pappy or Peter Machit, the other business agent, as to whether any determination had been made by the Labor Commissioner. Further, the Court examined the defendant on the negotiations with Fred Shelley and Sam Cohen and the type of operation they were going to have. Also, as to why Bob Dougherty was not included in the new contract (R.T. 1412-1415).

The Court then went into extensive questioning of the witness as to the health and welfare plan, the organizing of employees, keeping of records on member's grievances, and collection of dues (R.T. 1416-1430).

The next three witnesses testified as to the reputation of Robert Ruchti II. All three, James Edward King, Jerome Whiffen and Robert Cien Farani, stated that it was poor.

The next three witnesses, Charles Frank, Morris Kaufmond and Edward Sanchez, gave testimony that they had not been pressured to use Pronto Unloading. Mr. Sanchez

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testified in his interviewing of Sol Kramer, who likewise (R.T. 1442-1453).

The defense next called Mike Grancich, Sevretary-Treasurer of Teamsters Local 626. He testified fully as to his duties and the phone conversation with Fred Blea and Archie Galea. Allegedly, Blea told him to keep "his stooges off my back". He denied ever having received any money from Don Matthews at the Villa Basque, as testified to earlier by Mr. Valdez. He stated that the only time he went down to an area was when one of his business agents called him, not when the owner did (R.T. 1461-1462).

As to the conversation with Bob Dougherty, he testified that Dougherty asked him what he (Grancich) wanted him to say before the Federal Grand Jury. According to Mr. Grancich, he told him "There isn't a damn thing I want fron you, friend, but for you to tell the truth, and that is all." (R.T. 1462-1463).

On cross-examination by the Government

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the witness denied that he talked Mr. Fox into switching to Pronto Unloading (R.T. 1471).

The defense's next two witnesses, Edward Chacon and Tony Jayich testified briefly as to the incident on April 28th, 29th and 30th, and also about their duties as business agents. They both testified as to having been at various picket lines, which were entirely manned by business agents. (R.T. 1472-1481).

The next witness, Frank Martinez, gave testimony about two incidents involving Bob Dougherty and Robert Ruchti II in which either they threatened him or pulled a gun on him. He also stated that he accompanied Archie Galea after his accident because he was afraid they would gang up on him and beat him up. (R.T. 1481-1488). At one point, according to Mr. Martinez, Ruchti pointed a gun at him and told him, "I am going to kill you;" the police arrived about this time and no shooting took place (R.T.

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1487).

On cross-examination by the Government, the witness testified that he approached Mr. Sam Cohen and Fred Shelley about using union help if they wanted a contract with the uhion. He also testified briefly about the procedure in paying of dues for the Health and Welfare benefits (R.T. 148-1495).

At this point there was a brief pause, since some of the defense witnesses had not arrived, and the Court was insisting that the defense had enough time to get their witnesses together (R.T. 1495-1505).

The next witness, Mike Campanale, testified that he made a loan on instructions from his Father to Eddie Martinez and that he received various payments from Eddie [illegible] or one of his representatives (R.T. 1508-1510).

He was followed by his Father, Enrico Campanale, who is a partner in Pronto Unloading. He testified as to various loans made to Eddie Martinez and the

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collection made for them. He also testified briefly about the office operation at Pronto Unloading.

On cross-examination, Mr. Campanale denied ever making payments to members of the Teamsters, but added that he kept some money out to pay some guys that did some side work for Pronto. On the Union Contract, he testified that Pronto rarely paid the dues and health and welfare fees because the workers threatened to go on strike and also most of them didn't stick around long enough. One of the owners' sons did, however, but they had a different policy for him. However, this was part of the union contract according to Mr. Campanale, since they had an option on the insurance (R.T. 1525).

The defense next proferred Don Matthews, one of the partners in Pronto Unloading, and the alleged spokesman. He testified about the various companies he had owned or worked with and the different people involved in

them. In further testimony he remembered being approached by Archie Galea to get a union contract. According to Mr. Matthews the other partners in Pronto were not too happy to get a contract (R.T. 1534-1539). During the negotiations of the union, Mr. Matthews testified that he talked to Fred Blea and told him that it was inevitable and that sooner or later they all would have to sign a union contract. Mr. Matthews stated that he told Fred Blea that he wanted some funding to prolong the contract because it was costing him to retain an attorney. According to Mr. Matthews, Fred Blea continued to make the payments until Archie Galea got on him to sign a union contract (R.T. 1539-1543). He further testified that a $500 payment from Bob Dougherty was for a packing house account that he helped get for Dougherty in 1968. Also that Mr. Dougherty owed him thousands of dollars and in payment of these monies, he (Dougherty) would give him the "expense

check" from the partnership (R.T. 1544-1545). Mr. Dougherty, according to Matthews still owed him about $2,100; and $4,000 to Ray Ramirez (R.T. 1546).

On cross-examination by the defense, Mr. Matthews vehemently denied that he made a $100 payment to Archie Galea as testified to by Fred Blea, or that he gave some money to Mike Grancich at the Villa Basque (R.T. 1554).

On cross-examination by the Government, the witness was asked whether he had filed the check payment made from the partnership, and the check from Bob Dougherty on his income tax return for the respective years. On objection by the defense, the Court overruled the objection stating it went to the question of materiality (R.T. 1556-1557). Mr. Matthews answered that he did report it on the returns under miscellaneous cash (R.T. 1558).

On questioning about the difference in amounts of miscellaneous cash in 1969 and

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1970, the witness testified that 1969 was a rough year, and they had to pay $70,000 in attorney's fees.

The witness further testified about other payments made and reported on his income tax returns. Also, he went into the union contract and the payments made by Fred Blea and the coming [illegible] Bob Dougherty into Pronto Unloading (R.T. 1568-1580).

The next two defense witnesses testified on behalf of Pronto Unloading and the payment of dues and the reading of the Union Contract to the Spanish-speaking employees (R.T. 1598-1599). Further, Mr. Ruben Martinez claimed he was present when Fred Blea offered to help finance the prolonging of the union contract, which Dan Matthews was doing (R.T. 1598).

The next witness, Don Prayzich, further testified about the remedies an employee has against his employer and the jurisdiction of the NLRB (R.T. 1607-1610). Mr. Prayzich further testified that the claim made by the

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Teamsters Union was a valid claim (R.T. 1613).

On cross-examination by the Court, the witness testified that the Food Employers Council does not represent individuals but companies (R.T. 1620).

The next defense witness, Andrea Brannon, testified that she had a back-wage claim against Ruchti II, which he offered to settle for $250. Upon refusing the offer, he allegedly threatened to have her indicted for grand theft, for stealing meat from his cooler. She denied stealing the meat.

On cross-examination by the Government, she testified that she finally settled her claim for $240 (R.T. 1625).

The next witnesses, Irving Geldin, Edwin Bell and Charles Rosenour, testified taht they had never been pressured to use Pronto Unloading (R.T. 1626-1643). Mr. Rosenour introduced company records showing how much money was paid to Fred Blea for his services from 1967-1971. This was to counter

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Mr. Blea's argument that he had been driven out of business (R.T. 1641).

The court ruled the records were not relevant as collateral matters (R.T. 1643).

This brief discussion was followed up when the defense attempted to have their next witness, Christopher Rogers, testify as to the validity of the contract Pronto Unloading signed with the union. Again, the defense attempted to attack the testimony of a prior Government witness, who had been injured on the job (R.T. 1647).

The Court again refused to allow the witness to testify (R.T. 1650).

The next two defense witnesses, Don Tillien and Robert Andrew also testified that they were not pressured to use Pronto Unloading (R.T. 1651-1657).

The next witness John J. Griffen, Labor Commissioner, testified as to the honesty and veracity of Archie Galea and found him to be a man of his word. Further, in handling the case for the Food Employers

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Council in behalf of Ruchti, the only person he dealt with was Bob Ruchti II (R.T. 1657-1666).

The next witness, Robert Cierfenani testified concerning a wage claim made against Ruchti Bros. from which he received $148. He still felt that there was money owed him. The Court at this point said no because the witness was foreclosed by law to recover anything else (R.T. 1667). The witness claimed that the money received was for vacation pay which was due him (R.T. 1668). The witness testified that in conversation with Peter Macht, he was told there was a slim chance of getting the back wages.

The Court cross-examined the witness as to the wage claim and whether the witness knew that Ruchti was out of business.

On direct examination the next witness, Robert Ruchti II, testified that he did sell some meat to Lloyds of Long Beach (R.T.

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1676). He also testified that Ruchti Bros. had not changed their names on the stationary or on the trucks and further that they were still in business by renting their plant for $10,000 (R.T. 1679-1681).

On cross-examination by defense attorney Fishman, the witness testified that there was a lawsuit by Kenneth Bowman in which Ruchti Bros. had appealed after they lost in arbitration.

The Court at this point refused to allow the defense to pursue this line of questioning since the Judge argued that Mr. Santana knew there was a pending lawsuit (R.T. 1656). He rules this line of questioning was immaterial, since the defendant had the right to appeal (R.T. 1686-1688).

On cross-examination by the Government, the witness testified that Ruchti Bros. was still operating as a corporation, and it still owned facilities and that he primarily managed the business because of the illness

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of his father (R.T. 1688-1695).

In further testimony, Mr. Ruchti II testified to the closing of the plant, laying off of the employees and the alleged settlement of all claims. He went into the Labor Commission's hearing where a claim made by the Butchers Union was dismissed and another claim by the Teamsters was referred to the NLRB (R.T. 1697-1704).

He testified to the agreement made with George Pappy before the NLRB and the payment to the respective employees (R.T. 1704-1706).

On cross-examination by the Government, the witness testified about closing of the plant and some other claims that had been instituted since then (R.T. 1711).

On re-direct examination by the defense (McKissack), the witness could not remember whether anybody had made any claims (R.T. 1712). However, on introduction of an exhibit to refresh his memory he did recall some of the names (R.T. 1713). He further testified that he did receive a list from the

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Labor Commissioner, but most ot the people on the list were asking for their vacation pay (R.T. 1715-1716). He also testified that the decal on the Ruchti Bros. trucks had been changed and now read Ruchti Transport (R.T. 1728), and that his understanding of the pending claims was that they had been sent by the Labor Commissioner to the NLRB (R.T. 1730).

The next defense witness, William George Malomis, testified that he overheard Ruchti II comment that he was going to "nail Archie to the wall." (R.T. 1748).

Then James Edward King gave testimony that he filed a claim with the Labor Commissioner and nothing ever came of it, except that he did get his vacation check during this time (R.T. 1750-1754).

The defense then recalled Jerome Whiffer who had a $5,000 claim against Ruchti Bros. He testified as to the closing of the plant and his filing of the claim for the monies owed him. On cross-

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examination he testified that the claim was filed by Peter Macht of Local 626 (R.T. 1759). Also that he duly received his vacation pay and nothing was ever resolved on his claim IR.T. 1761-1762).

The next defense witness Attorney Gerald Goldfarb testified about some claims brought by the Butcher's Union. He stated that he and David Santana went to the Labor Commissioner's hearing to see what action the Commissioner was going to take. After the Commissioner ruled that he had no jurisdiction to enforce the wage claim, they dropped the idea of going before the Commissioner (R.T. 1768).

On cross-examination the witness testified that the claims totaling about $7,500 were never pursued in a civil court and that he never advised such action (R.T. 1770-1780).

The next defense witness also testified that he had a wage-claim pending

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against Ruchti Bros. from 1966 to 1971 when it was finally settled. Originally he was asking for $4,300, but the settlement in the Superior Court was for $2,000. On cross-examination the Government contended that if the witness had discussed such wage claim with David Santana and, if Mr. Santana knew about the filing and pending Court action, then any picketing done during this time was illegal (R.T. 1783-1790).

The defense at this time introduced the NLRB file, which they felt was indispensable to the case. The Court agreed to take a look at it during recess (R.T. 1797).

The next defense witness was James J. Rodriguez, Executive Secretary of Butcher's Union Local 563, who testified as to the duties of a business agent and the procedure for calling people out on strike (R.T. 1800-1803). He gave testimony preceding the April 28, 29 and 30th incident in which he advised David Santana to go to the scene as an observer for the Butcher's Union (R.T.

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1804).

On cross-examination by the Government, the witness testified that he had known about at least one case that had gone through the courts and that most of the wage-claims were settled throught arbitration, if they were settled at all. On questioning about whether he knew about the pending wage claim the witness testified that he did not and was not sure if Ruchti Bros. was still the same as Ruchti Transports.

He testified that he did not know it was a different business until David Santana advised him on either April 28th or 29th of 1971 (R.T. 1812-1820).

On re-direct examination by the defense (Fishman) the witness testified that usually most companies would honor the arbitartion awards, but in the Ruchti case the company had refused to honor such awards. He cited the Bowman case, which dragged on four or five years before it was settled (R.T. 1920-

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1828).

The defense next recalled Bob Dougherty, who testified about the $10,000 he borrowed from Don Matthews and the amount paid on a monthly basis (R.T. 1829 -)

The defense called Fraver Grundinger briefly to testify about the record keeping of union dues paid by the members of Local 626 (R.T. 1838)

Next the defense recalled George Pappy, the Teamster Attorney and expert on Labor Law.

He testified that he advised Archie Galea that the Teamsters were within their rights to picket Ruchti for the back-wages. He based this on the ruling by a Superior Court Judge stating that the Teamsters had the right to collect back wages (R.T. 1843).

He further testified about the different ways a union can collect dues from its members: (1) the employee pays himself; (2) the employer pays for the employee; (3) the union Steward or Business Agent

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would collect the dues (R.T. 1845-1848).

On cross-examination by the Government the witness testified that based upon the facts given to him by Archie Galea, who was the man on the spot, he concluded that Ruchti Transport was a successor corporation, and this was a sufficient basis to picket them. The witness went on to explain recent rulings on successor corporations citing the recent Burns case before the Unite States Supreme Court (R.T. 1867).

At this point the witness was questioned about his interpretation of the settlement agreement (R.T. 1872). The Court intervened at this time and conducted extensive questioning of the witness and compelled the witness to read the letter discussing the NLRB Agreement. The Court wanted a simple yes or no answer as to whether the wage-claims had been settled. The witness stated that such an answer was impossible since his interpretation or state of mind did not resolve the wage claim, but related to the wage claims

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under the collective bargaining agreement. He stated that the NLRB had no jurisdiction to enforce these wage claims. The Court repeatedly told the witness that jurisdiction had nothing to do with the NLRB letter.

The witness stated that since the wage claims were not covered by the unfair labor practices, which the Board found; they attempted to collect them by picketing (R.T. 1872-1884).

On further questioning by the Government (Mr. Carney), Mr. Pappy testified that the action on the picketing was decided by Archie Galea on behalf of the Union. Also that there was no action pending to recover or reinstate the wage claims at this time (R.T. 1886-1892). The picketing, according to Mr. Pappy, was not done for any specific amount, but for claims that were outstanding (R.T. 1893). Also he gave testimony as to how the different amounts were arrived at in

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conformity with the collective bargaining agreement (R.T. 1894).

The Court intervened again at this point and went back to the back-wages claim filed by one James Hitt and how the amount of the claim had been arrived at and if the witness understood the meaning of the settlement agreement. Also on what charge the particular claim had been settled. The witness attempted to answer but kept getting cut-off by the Court at this point (R.T. 1893-1910).

In further questioning by the Court, the theory of the charges was explored some more as to what constitutes unfair labor practice and under what specific charges was Mr. James Hitt making his claim (R.T. 1916-1917).

The witness testified as to the nature of the claim, as well as to the theory and went into different hypotheticals which could constitute unfair labor practices. During the same testimony the witness stated that he

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not give any specific answer since there was never an opinion issued by the NLRB (R.T. 1918-1925).

At this point the defense introduced numerous exhibits for the record. A lawsuit filed against the union and other individuals for the purpose of showing bias and prejudice on the part of Blea and Rodarte. A letter on Ruchti Bros. stationary; a record of Ford J Motors showing the purchase of the VW by Archie Galea; the W-4's of Mr. Villamonte, and the Labor Commissioner's file (R.T. 1938-1944). The Court rejected the following: the record of the Union Pacific Railroad, checks from Lloyd's furniture, the union collective bargaining contract, etc. (R.T. 1944-1952).

The Government now called Attorney Douglas Olin from the NLRB, who testified about the settlement agreement on the Ruchti Bros. case. He testified that the substance of the charge was a refusal to bargain and that the back wage aspect had been part of the settlement agreement (R.T. 1954-1955).

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On cross-examination by the defense, Mr. Olin testified that the settlement agreement was on unfair labor as opposed to back wages, since the NLRB had no jurisdiction over contract violations (R.T. 1958). At this point the Court intervened and asked the witness whether the back wages had been settled. Mr. Olin replied that it was not a back wage claim that was settled and that they were incidental to the refusal to bargain charge.

The Court seemed to be pressuring the wtiness into admitting that the back wages was part of the settlement, but the witness testified that it was the refusal to bargain charge that was settled (R.T. 1966).

On cross-examination by the defense, the Court refused to allow the attorney to pursue the question of how the amount was arrived at. He rules that the settlement had extinguished the obligation of the NLRB to determine whether any other claims could be brought again (R.T. 1974).

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The Government next called Robert Ruchti, Sr., who testified about the formation of the corporation and that he was actually in charge during this time (R.T. 1976-1978).

On cross-examination the witness could not recall meeting Don Prayzich or Charles Fox from the Food Employers Council, who represented his corporation in the unfair labor dispute. He also had never talked or met J. J. Rodriguez from the Butcher's Union.

The Government next recalled Robert Dougherty, who gave further testimony that the only two people who handled the Pronto Unloading monies were Dan Matthews and Enrico Campanale (R.T. 1982-1983).

On cross-examination by the defense, Mr. Dougherty admitted that in a deposition taken on January 8th, 1973, he did not state that his wife was put on the Pronto payroll but did no work (R.T. 1985). At the same deposition Mr. Dougherty testified that he did not receive any benefit when in fact he was receiving Workmen's Compensation (R.T.

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1987-1988). The witness further testified that he was in charge of the expense account and did all the wining and dining (R.T. 1990-1992).

The Government next called Fred Shelley, who testified that he never received any $600 a week. However, on cross-examination he did admit that the partners would get $600 together and split it up six ways (R.T. 1995-1996).

On cross-examination Mr. Shelley testified that Dan Matthews stole from the corporate books and lied in terms of taking the money and as to where it was going (R.T. 1997-1998).

At this point, counsel for the defense attempted to introduce a sworn statement taken before the Los Angeles Strike Force where the witness testified as to payments allegedly made by Don Matthews to the union (R.T. 2000). The Court refused to allow this as impeachment of the partners and told the attorney he should learn how to impeach a witness.

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(2001-2003). In the statement the witness testified before the Los Angeles Strike Force that "we stole a lot of money", "we" referred to the partners in Pronto Unloading. (R.T. 2003).

The Government next called Ray Trujillo, who testified about being in the unloading business and making payments of $50 a week to Don Matthews (R.T. 2007-2008).

The Court at this point refused to allow the defense to present a previous felony conviction for possession of pills (R.T. 2016).

On cross-examination the witness testified as to contract negotiations and the agreement made with Don Matthews to pay $50 a week. Also that he perjured himself before the Grand Jury in October of 1971 as to whether any payments were made to Don Matthews or Enrico Campanale (R.T. 2016-2023).

On re-direct examination the witness testified that the perjured testimony given before the Grand Jury was done because of

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losing his business (R.T. 2039).

The next Government witness, David Madrid, testified as to a conversation he had with Don Matthews in which he was told that he would have no problem with the union anymore; that Matthews had told Martinez that if he wanted any more dues, he would have to collect them himself (R.T. 2038). The Government was attempting to use this conversation to impeach the testimony of Don Matthews. The Court allowed the testimony for that purpose (R.T. 2039).

The defense brought in a conviction of the witness for the conspiracy to sell dangerous drugs.

The Government next recalled Edward Martinez, who testified that he never received any money from Mike Campanale (R.T. 2049-2050).

Then came Fred Blea for the Government, who testified that he never had any conversation with Don Matthews as to the fact that the $50 payment was going for attorney's

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fees. (R.T. 2051-2052).

The next Government witness, Helen Taylor, Payroll Clerk for Pronto Unloading, gave testimony as to cash payments made to employers and also payments made by check. She further testified about the checks she made out to pay the various expense accounts including those of Don Matthews (R.T. 2053-2067).

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME

I

PETITIONERS WERE FALSELY CONVICTED OF VIOLATING THE 1970 AMENDMENT TO THE "HOBBS ACT".

A. Statutory Analysis: The "Anti-Racketeering Act".

The prosecution of Petitioners, on Count 1, is based on a 1970 Amendment to the "Hobbs Act", sometimes called "The Anti-Racketeering Act". We observe, at the outset, that the Act was not intended, by the Congress, to apply to the small scale operations whether or not these operations, in the technical sense, violate some provision of state or federal law.

It is clear, from the Congressional Statement of Findings and Purpose, that the statute was enacted to strengthen the prosecution of persons engaged in "organized crime", which the Congress found

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was "... a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption". (Section 1 of Pub. Law 911-452).

The use of this statute to prosecute Petitioners-labor union officials, is exactly contrary to the Congressional intent, and the expressed objectives of the Act's Congressional sponsors. It was repeatedly emphasized, in the congressional debates, that the bill did not "... interfere in any way with any legitimate labor objective or activity". (Representative Walter, at 91 Congressional Record 11841). In the debate on the original enactment, Representative Hobbs stated: "This bill does not cover strikes or any question relating to strikes." (89 Cong. Rec. 3212; both quotations cited in United States v. Enmons, 410 U.S. 396, 35 L. Ed. 2d 379, 385; 93 S. Ct. 1007).

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Use of the "Anti-Racketeering Act" to prosecute Petitioners, instead of organized criminal elements, is the precise prosecutorial abuse that was feared by the Congressional opponents of the Statute; who charged that the bill "masqueraded under false pretenses", and would not "deliver". They stated: "In a criminal statute where the term "organized crime" is an operative device, it is not defined. When asked about the omission, the drafters explained that it was impossible to define, but everybody knew what it was." (United States Congressional and Administrative News (1970), presenting views of three dissenting Representatives, at p. 4091).

It is clear, from the record, that the acts of Petitioners did not constitute "organized crime", and were not within the legislative intention, expressed in Public Law 91-452, and related stattues.

Moreover, the applicable statute, is itself unconstitutional, on two grounds:

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First, the statute is vague and ambiguous, and does not adequately describe the offenses that are prosecuted.

Secondly, if the Statute is interpreted to proscribe, and make criminal, an act that occurred prior to enactment of the Statute, then the legislation violates both the 5th and 14th Amendments to the Constitution of the United States of America, and also violates Article I, Section 9(3), of the Constitution, which proscribes the enactment of ex post facto legislation.

It is fundamental that a statute will not be interpreted in such a manner as to make it unconstitutional, if any other interpretation is reasonably possible. In this instance, we submit, the Statute should properly be interpreted as being inapplicable to acts that occurred prior to the effective date of October 15, 1970. The refusal of the Trial Judge to exclude such evidence, and the ruling that evidence of such pre-statute acts were relevant to

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the charge of violating Public Law 91-452 (18 U.S.C. Section 1961,et seq.), constitutes prejudicial error.

B. Statutory Analysis: The Government Theory on Interpretation of Public Law 91-452 Is Contrary to the Plain Meaning of the Statute, and the Legislative Intention: Adoption of Theory by Trial Judge Constitutes Prejudicial Error.

The Government asserted, at the trial, that although Petitioners were not associated with "organized crime", they had nevertheless violated Chapter 96 of 18 United States Code, as alleged in Count I. The Government asserted that the statute should be interpreted as follows:

1. The term "racketeering activity" is defined, in 18 U.S.C. Section 1961 (1) as any act which is indictable under 18 U.S.C. Section 1503 and 1510(obstruction of criminal investigation, Indictment, Count 1(f) and (g)); or 19 U.S.C. Section 1951, on interference with commerce, or extortion; (Count 1(b) and (c)); or 28 U.S.C. Section

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186, prohibiting payment of money by an employer to a labor union official. (Count I(a), (d) and (e)).

2. The term "pattern of racketeering activity" refers to at least two acts of racketeering activity, as defined in the statute, cited above, one act occurring after 15 October 1970, the effective date of Public Law 91-452; and "the last of which occurred within ten years ... after the commission of a prior act of racketeering activity ..." (18 U.S.C. Section 1961(5)).

3. It is unlawful for any person associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate "... in the conduct of such enterprise's affairs through a pattern of racketeering activity ..." (18 U.S.C. Section 1962(c)).

4. It is unlawful to conspire to

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legislation.

As stated in Thompson v. Utah, 170 U.S. 343, 18 S. Ct. 620, 42 L. Ed. 1061, a penal statute is ex post facto "... which by its necessary operation and in its relation to the offense or its consequences, alters the situation of the accused to his disadvantage". Thus, statutes have been held invalid, as constituting ex post facto legislation, if they punish an act innocent when done, increase the punishment, or deprive a person of a defense. (Beazell v. Ohio, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 356; Lindsey v. Washington, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182).

It is clear that an agreement allegedly made in 1968, as described in Count I, and overt acts allegedly committed pursuant thereto, between 1968 and October 15, 1970, would not violate Title IX of Public Law 91-452 (18 U.S.C. Sections 1961-1968), when they were committed. Punishment of such agreement, and such "overt acts" would

constitute ex post facto legislation.

Admission of evidence of such acts, allegedly committed between 1968 and 1970, was improper, for they were not relevant to any issue before the Court, and such evidence was clearly prejudicial to Appellants.

We cite the following erroneous rulings of the Trial Judge in admitting evidence of pre-1970 actions:

1. Fox, on a conversation with Defendant Granchch in 1966-67. (R.T. 129, line 13, to 130, line 24.)

2. Choe, on a conversation with Defendant Galea and Joseph Loya, in February, 1970. (R.T. 154, lines 2-17).

3. Robinson, on a conversation with defendant Galea and Joseph Loya in December, 1969 (R.T. 166, line 2 to 167, line 21; 169, line 11, to 170, line 11; 171, lines 16-22).

4. Gronsky, on a labor dispute in June, 1969 and conversation with Defendants

Grancich and Galea. (R.T. 197, line 16, to 199, line 12).

5. Goldstein, conversations with Defendants Grancich and Galea, and payment of check to Defendant Galea, in June,1969. (R.T. 221, line 6, to 233, line 25; Ex. 2 admitted in evidence over objection that it was irrelevant as to Co-Defendants at R.T. 222, lines 7-16; Motion of Co-Defendants to Strike Testimony as to them, and for instruction to Jury, denied, R.T. 334, line 16, to 235, line 4).

The testimony of Robert Dougherty, a major Government witness, was largely directed to events that occurred prior to October 15, 1970, as shown in the following references:

1. Conversation with Defendant Matthews in September-October, 1968 (R.T. 240, lines 1-25).

2 Conversations with Pronto and Defendant Galea in March, 1969 (R.T. 241, linel, to 244, line 18).

3. Meeting at Barney's Restaurant in April, 1969, with Pronto, Defendant Galea and Jcseph Loya and Ray Ramirez (R.T. 245, line 13, to 252, line 12).

4. Payments that he believed were being made by Defendant Matthews to Defendant Galea, between 1969 to October 15, 1970 (R.T. 269, line 13, to 275, line 25).

5. Conversation of Defendant Galea with Defendant Matthews in January, 1970 (R.T. 277, lines 1-24); check payable to Defendant Matthews, dated November 1, 1968 (Ex. 4; R.T. 279, line 12, to 282, line 30).

A similar situation, that is, testimony largely directed to events that occurred prior to October 15, 1970, prevails with the balance of the Government witnesses, as shown in the following references:

1. Helen Taylor, Pronto bookkeeper, described events from February 7, 1969, to October 15, 1970, or without regard to time, and identified checks drawn in the same period. (R.T. 366, line 8, to 377, line 17;

Exs. 5A-5Z and 5AA-5JJ).

2. Manual Valdez: Meeting with Pronto and Defendant Grancich, in the summer of 1968. (R.T. 392, line 13, to 394, line 20).

3. Edward Martinez, on conversations with Pronto in the spring of 1968 (R.T. 848, line 9, to 850, line 22); and weekly payments to Pronto between 1968 and 1970, extending to March, 1972 (R.T. 851, line 1, to 852, line 4).

4. Ricardo Rodarte, on conversations with Pronto in the summer of 1968, and checks drawn that year, payable to Pronto. (R.T. 397, line 9, to 907, line 6; Exs. 7A-7K).

5. Alfred Blea, on events of 1968 and 1969, including a conversation with defendants Grancich and Galea (R.T. 930, line 14, to 940, line 2).

The testimony on events between 1968 and October 15, 1970 is clearly irrelevant, and its admission, we submit, constitutes prejudicial error. Moreover, if this

testimony were stricken, it is evident that the conviciton of Petitioner on Count I could not be sustained, because there would be no evidence of even two acts defined as "racketeering activity", committed after October 15, 1970, and no evidence on an agreement, or a conspiracy.

C. Application of the Hobbs Act Herein Contradicts Supreme Court Decision in "Enmons".

It is respectfully submitted that, in holding 91-452, the "Hobbs Act", applicable to the labor-management operation presented here, the circuit court has squarely contradicted the decision of the Supreme Court in United States v. Enmons, 410 U.S. 396, 35 L. Ed. 2d 379, 93 S. Ct. 1007. As this Court there stated: "The legislative framework of the Hobbs Act dispels any ambiguity in the wording of the statute and makes it clear that the Act does not apply to the use of force to achieve legitimate labor ends."

In both the trial court and on Appeal,

the Government argues that the "Hobbs Act" was meant to have broad coverage, and encompass the "employer-employee" relationship. The Government's argument was accepted by the Trial Judge, who rejected all evidence offered on the whole business of labor disputes, and the unionization of the "Pronto" corporation.

The 9th Circuit Court ignores the effect of Enmons. It states flatly that the Hobbs Act proscribes the activities there described "... no matter who engaged therein," and that its effect is not restricted to particular persons, or to "organized crime" (Op. pp. 16-17). This conclusion is contrary to Enmons, supra. In United States v. Caldes, 457 F.2d 74, 78, Congress did not intend "... that acts of violence which are the by-product of frustration engendered by a prolonged, bona fide collective bargaining to be 'extortion' within the meaning of the Act."

II

THE ENTIRE RECORD DEMONSTRATED THAT THE TRIAL JUDGE WAS NOT AN IMPARTIAL JUDGE REPRESENTING THE IMPERSONAL AUTHORITY OF THE LAW BUT WAS AN "ACTIVIST SEEKING COMBAT" WHO VIOLATED THE "NEUTRALITY" OF A TRIAL JUDGE OF CRITICAL IMPORTANCE TO THE FAIRNESS OF A CRIMINAL TRIAL, THEREBY DEPRIVING PETITIONERS OF THEIR RIGHT TO A FAIR TRIAL UNDER THE CONSTITUTION.

The Supreme Court has recently interpreted and reaffirmed its holding in Offutt v. United States, 348 U.S. 11 (1954) that a trial judge must not be "an activist seeking combat" but must represent "the impersonal authority of the law". Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

In the instant case, the actions of the

trial judge, from the day he first encountered the participants in the proceedings below, can only be described as a persistent attack on Petitioners, their co-defendants, defense attorneys, defense witnesses and anyone who supported them. His every response was that of an adversary eager to do battle. He was not a judicious, impartial governor of the trial as has long been required by the Supreme Court. As Mr. Justice Black wrote for the Court in Gideon v. Wainwright, 372 U.S. 335, 344 (1963):

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. (Emphasis added)

See also, Starr v. United States,[1] 153 U.S. 614 (1894); Bollenbach v. United States,[2] 326 U.S. 607 (1946) and Queria v. United States,[3] 289 U.S. 466 (1933). Far from being

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1/ Cited and followed by our Courts. See United States v. Tobin, 426 F.2d 1279 (1970)
2/ id.
3/ id.

judicious and impartial, the judge in the case at bar created, escalated and contributed to the Star Chamber atmosphere which characterized the trial below.

Such conduct necessarily influenced the jury and prejudiced them against Petitioners, interfering with what Mr. Justice White has called the "inestimable safeguard ... against the compliant, biased or eccentric judge."

As the Court noted in Bollenbach, supra:

> Jurors are ever watchful of the words that fall from (the judge). Particularly in a criminal trial the judge's last word is apt to be the decisive word. (326 U.S. at 612).

Similarly, as the 7th Circuit recently said in United States v. Bukowski, 435 F.2d 1094 (1970):

> Beyond question the neutrality of the trial judge is of critical importance to the fairness of a criminal trial. His influence upon the jury is great, and he must carefully guard against prejudicial comments which might create even the appearance of partiality ... This principle extends to the relations between

the court and counsel. (Emphasis added).

Our Courts have been quick to reverse when there has been a showing that the trial judge did not remain "impartial", "judicious" and "neutral" as required by law. See United States v. Ryan, (9th Cir. 1971) 455 F.2d 728; United States v. Tobin, (7th Cir. 1970) 426 F.2d 1279; United States v. Hill, (7th Cir. 1964) 332 F.2d 105; United States v. Fry (7th Cir. 1962) 304 F.2d 296; United States v. Carmel, (7th Cir. 1959) 267 F.2d 345; United States v. Scott, (7th Cir. 1958) 257 F.2d 374; and United States v. Levi, (7th Cir. 1949) 177 F.2d 833.

The denigrating comments made by the trial judge were spoken by him both in and out of the presence of the jury. For our purposes here, it makes little difference whether the jury was present since, whenever the comments were made, they show that the judge was "an activist seeking combat" and are indicative of his partisanship against Petitioners, and

served to intimidate counsel and restrict their conduct of the trial. However, we do note that those comments before the jury (which most of them were) are tinged with the additional sin that they must have had an adverse impact upon the panel's impartiality, since it is well known that the jury is heavily influenced by the judge [5/] and this

5/ "According to common experience, few shafts strike deeper into jurors' minds, during trial, than words spoken by the presiding judge." Judge Finnegan's concurring opinion in Wheeler, 219 F.2d 773 at 778 (7th Cir. 1955).

"The judge occupies a position of great influence with the jury in conducting a trial; ***he should be careful not*** to say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts." Virginian Ry. Co. v. Armentrout, 166 F.2d 400, 405 (4th Cir. 1947) quoted in Levi, supra at 836.

"... The (trial judge) must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings." United States v. Ah Kee Eng, 241 F.2d 157, 161 (2nd Cir. 1957).

"... he may present to others an appearance of partisanship, and, in the minds of jurors, so identify his high office with the prosecution as to impair the impartiality

jury could not but have noti:ed the judge's negative attitude towards the defense.

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with which the jury should approach its deliberations." Taylor v. Peter Kiewit & Sons Co., 271 F.2d 735 (4th Cir. 1959).

"... in a jury case, a trial judge should exercise restraing and caution because of the possible, prejudicial consequence of the possider's (sic) intervention." Jackson v. United States, 329 F.2d 893, 894 (D.C. Cir. 1964).

"That a jury is highly sensitive to every judicial utterance is axiomatic ... A judge's words to the jury carry an authority bordering on the irrefutable." Moody v. United States, 377 F.2d 175 at p. 177 (5th Cir. 1967).

"The trial judge must not usurp the function of the jury, nor give the jury the impression of partisanship on either side." United States v. Ornstein, 355 F.2d 222, 224.

"It is well known, as a matter of judicial notice, that juries are highly sensitive to every utterance by the trial arbitrater, and that some comments may be so highly prejudicial that even a strong admonition by the judge to the jury, that they are not bound by the judge's views, will not cure the error ... A trial judge must strive for total neutrality and complete circumspection, in the eyes and minds of the jury." (Emphasis added) Bursten v. United States, 395 F 2d 976, 983 (5th Cir. 1968).

"As the only disinterested lawyer whose only interest is to see that justice is

done, and especially as one who, in the eyes of the jury, occupies a position of preeminence and special persuasiveness, the district judge must be assiduous in performing his functions as governor of the trial dispassionately, fairly and impartially." Pollard v. Fennel, 400 F.2d 421, 424 (4th Cir. 1968).

"Because of his (trial judge's) proper power and influence it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench be not exploited towards a conviction he may privately think deserved or even required by the evidence." United States v. Brandt, 196 F.2d 653, 656 (2nd Cir. 1952).

"It is axiomatic that a trial judge in a criminal case must use the utmost care not to give the jury the impression that he is a partisan for either side." United States v. Light, 395 F.2d 909, 911 (2nd Cir. 1968).

"A mere withdrawal of words and a direction to the jury that the question is for them, is not always sufficient. The effect of what was said may remain." Rudd v. United States, 173 F.912 (8th Cir. 1909).

"It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial." Hunter v. United States, 62 F.2d 217 (5th Cir. 1932).

In reversing the conviction in Offutt, Mr. Justice Frankfurter described the proceedings as follows:

> Almost from the outset, a clash between the presiding judge and petitioners became manifest, which, it is fair to say, colored the course of the trial ... and with increasing personal overtones. (348 U.S. at 12)

In People v. Marino, 111 N.E. 2d 534 ((11. 1953) the Court noted that "jurors are ever watchful" and "In a criminal trial, a hostile attitude towards an accused or his witnesses is very apt to influence the jury in arriving at its verdict."

In People v. Lewerenz, 181 N.E. 2d 99 (Ill. 1962) the Court noted that jurors are quick to perceive any leaning of the Court.

In People v. Wilson, 174 N.W. 2d 914, 196 (Mich. 1969) the Court reversed because the judge had disciplined counsel often before the jury saying: "Trial judges who berate, scold and demean a lawyer so as to hold him up to contempt in the eyes of the jury, destroy that balance of judicial impartiality necessary to a fair hearing."

Mr. Justice Frankfurter's description fits only too well the actions of the trial judge in the instant case which, even before the trial began, evidenced "a clash" with "increasing personal overtones".

This bonbardment of denials was accompanied by incessant attacks on defense counsel which started soon after the trial began. (See Appendix A).

When defense counsel objected to this scandalous and unethical attack on them and refused to ransom the Petitioners' rights, the Court stepped up its intimidation and bias rendering a fair trial impossible. Iibid).

He actively interfered with presentation of the defense and precluded admission of whole sections of essential defense testimony (ibid).

He was deferential to Government witnesses and took immediate steps to protect them from searching cross-examination and impeachment; was openly hostile and

disrespectful to defense witnesses. (Ibid).

Indeed, the judge himself often overstepped the traditional bounds of courtroom conduct by his outrageous characterizations of defense counsel, undermining the Defendants' right to effective counsel guaranteed by the Sixth Amendment. (ibid).

He denigrated counsel by asting aspersions on thier veracity and competence. (ibid) He made repeated adverse comments about defense counsel's legal ability, often coupled with a stubborn refusal to give the basis for his rulings. (ibid).

He used his discretionary powers respecting time as a weapon against the defense. ((bid)

He took things personally and improperly injected himself into the proceedings. (ibid)

He applied a double standard, ruling differently for the prosecution and for the defense. (ibid)

It may be that any <u>one</u> of the episodes

discussed here might not necessarily in and of itself require reversal. However, as the Court said in Tobin the cumulative prejudicial effect of the trial judge's behaviour requires reversal of defendants' convictions. [6/] The examples of the

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6/ This Court must reverse the Petitioners' convivictions as it did in the following cases because of lack of impartiality of the trial judge:

United States v. Tobin, 426 F.2d 1279-1280-83 (1970) (Opinion by Senior Circuit Judge Hastings joined by Chief Judge Swygert and Judge Fairchild). The Court reversed on the basis of "what occurred during the trial" sayint that the defendant's "major contention" was that "the trial judge displayed hostility toward his attorney ... point(ing) to certain interchanges between the trial judge and his attorney in which the judge made remarks which might have been construed by the jury as expressing disapproval of counsel's tactics and the merits of the defense." "He (defendant) contends that his credibility was effectively destroyed in the eyes of the jury by the actions of the trial judge." The Court noted that "a critical element of the defense" was defendant's "motivation in making the trip". This was also a key element in the instant case.

The totality of the Court's actions before the jury in the instant case might well have influenced their determination of this key issue. In Tobin the Court said, "The avoidance of any appearance of lack of impartiality is of particular importance in

trial judge's hostility towards defense attorneys described in Tobin are mild

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cases where, as here, the question of guilt may be a close one." The instant case is a close one,and the trial judge lacked not only "any appearance" of impartiality, he lacked "impartiality".

United States v. Fry, 304 F.2d 296, 298 (1962) (Opinion by Chief Judge Swygert joined by Judge Duffy, Judge Schnackenberg dissenting). The Court said that the trial judge departed from "an attitude of disinterestedness" and acted "in a manner hostile to or derisive of defendant's cause" and in such a manner as "to destroy the required atmosphere of impartiality. Whether the evidence offered by the Government of defendant's guilt indicates that he is guilty as charged is irrelevant to the separate issue whether he received a fair trial."

United States v. Scott, 257 F.2d 374, 377 (1958) (Opinion by Judge Parkinson joined by Judges Major and Hastings). The Court said that the trial judge should not say "anything" which might prejudice "the cause of either party before the jury whose duty it is to decide the facts" and had a "duty" to "maintain throughout the trial an atmosphere of impartiality", and that the Court by "praises for counsel for the Government" "compounded" his other error as "such partiality would exert such a strong controlling influence on the jury against the adverse adverse party as to preclude any possibility of a fair trial".

United States v. Hill, 332 F.2d 105, 106 (1964) (Opinion by Judge Duffy joined by Judges Schnackenberg and Castle). The Court said "A fair and impartial trial is

compared with the numerous examples of the pervasive antagonism towards defense attorneys

guarnateed to every defendant, and fundamentally means a trial before an impartial judge and by an impartial jury" pointing out that when the jury get "the idea that the judge is on the side of the Government, the cloak of impartiality which the judge should wear is destroyed."

United States v. Levi, 177 F.2d 833, 837 (1949) (Opinion by Judge Duffy joined by Chief Judge Major and Judge Minton). The Court said that "the scales of justice were in effect weighed against" defendant by an unexplained comment of the judge in the presence of the jury.

Although the court did not reverse in other cases, language which the Court used indicated that it would have reversed on the instant record:

United States v. Holden, 355 F.2d 453, 456 (1966) (Opinion by Chief Judge Swygert joined by then Chief Judge Hastings and Judge Knoch). "such impartiality is precisely what is expected of them" (trial judges) and "prejudice must be shown by trial conduct". We have shown such "prejudice by "trial conduct".

United States v. Lee, 107 F.2d 552, 529 (1939) (Opinion by Judge Kerner joined by Judges Major and Treanor). The Court admonished trial judges against evidencing bias for the prosecution saying "He (judge) must not forget the function of the judge and assume that of the advocate lest he give the jury the impression that he favors one side or the other ...".

expressed in his numerous injurious attacks on defense counsel, in which he questioned their veracity, motives and ethics many times in the presence of the jury. Through these attacks the trial judge "conveyed to the jury the judge's own doubts about the merits of the defense". 7/

It is axiomatic that the trial judge was required to avoid any "appearance of lack of impartiality". As our Courts have pointed out, this responsibility is especailly high where the case is, as here, a "close case". Far from meeting this high responsibility, the trial judge constantly evidenced his partiality, ruling one way for

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United States v. Wheeler, 219 F.2d 773, 777 (1955) (Opinion by Chief Judge Duffy joined by Judges Finnegan and Schnackenberg). The Court said "We think it was error to volunteer the statement in the presence of the jury that the objection which the Government made was the one the trial judge has been waiting for ...".

7/ See discussion of Tobin, supra, fn. 6.

the prosecution and the other way for the defense on identical questions, refusing to admonish the prosecution even for gross misconduct while admonishing the defense even for innocent and proper conduct and abusing defense witnesses while supporting Government witnesses. 8/

8/ See, for example, the following decisions of various circuit courts of appeal reversing convictions on the ground of judicial misconduct:

"... he ... must remain the judge, impartial, judicious, and above all responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested." United States v. Brandt, 196 F.2d 563, 655-6 (2 Cir. 1952).

"While an appellate court should be loath to read too much into the cold black and white of a printed record, it cannot disregard numerous remarks from the bench of a nature to belittle and humiliate counsel in the eyes of the jury." United States v. Ah Kee Eng, 241 F.2d 156, 161 (2nd Cir. 1957).

"If had had the temerity to characterize any action of the judge as foolish, he would no doubt, have met instant punishment for contempt. In the administration of justice, the function of counsel is almost, if not quite, as essential and important as is the judge,and counsel, in the proper performance of his duty, is entitled to the courtesy and respect of the court." Zebouni v. United States, 226 F.2d 826, 827 (5th Cir. 1955).

The overwhelming conclusion is that, in

"The threat of contempt not only tended to belittle the lawyer in the eyes of the jury, but also to unnerve him and throw him off balance so that he could not devote his best talents to the defense of his client." United States v. Kelley, 314 F.2d 461, 463 (6th Cir. 1963).

"Although the judge's caustic and disparaging remarks were, for the most part, directed at defense counsel, they undoubtedly gave the jury the impression that the defendant's case was of little substance and was not worthy of very much attention". United States v. Coke, 339 F.2d 183, 185 (2nd Cir. 1964).

"We cannot say with sufficient confidence that the jury did not hear the court's remarks (criticizing defense counsel) and were not thereby prejudiced ... even if no prejudice to the defendants were apparent, the interests of public justice require a trial conducted by one who is a disinterested and objective participant in the proceeding." Young v. United States, 346 F.2d 793, 795 (D.C. Cir. 1965).

"Even if there is a basis for some criticism of over partisanship of defense counsel, this does not justify unwanted and unnecessary continuous interruptions." Bursten v. United States, 395 F.2d 976, 983 (5th Cir. 1968).

"Assuming as we do that the court had no intention of disparaging counsel, nonetheless we cannot avoid the conclusion that ... reading the statute (to defense attorney) could have had a belittling effect on Cromling's counsel and therefore, on Cromling's case. We, therefore, conclude

the words of our Courts the trial judge was not wearing a "cloak of impartiality" that the court's action was prejudicial... The court said: Oh, you have objected to half a dozen things. Don't worry about this one'. The latter remark of the court implies a disparagement of Cromling's counsel. Such a remark must be deemed to be hurtful and, therefore, prejudicial ... Considered as a whole, they (remarks to defense counsel) appear to fall into an undesirable pattern which might have had the effect of causing the jury to consider the plaintiff's case other than on the merits." Cromling v. Pittsburgh and Lake Erie R.R. Co., 327 F.2d 142, 151, 152 (3rd Cir. 1963).

"Examination of the record shows an extremely hostile attitude toward the defendants and their counsel by the trial judge ... The judge then said: (to defense counsel) "We don't want a speech from you. Your motion is denied." United States v. Koenig, 300 F.2d 377, 380 (6th Cir. 1962) (We cite this example to show how little is considered "an extremely hostile attitude".)

"... it is incumbent on the judge to conduct himself impartially and without the obvious indication of continual agitation and hostility toward counsel for either side ... the judge's persistent and repeated interruptions of defnese counsel during the trial and during counsel's summation with sharp, critical comments, undoubtedly tended to prejudice the defendant before the jury and deprive her of a fair trial." United States v. Cassiagnol, 420 F.2d 868, 879 (4th Cir. 1970).

and an "attitude of disinterestedness". He did not give an appearance of lack of impartiality". He lacked "neutrality" and weighed "the scales of justice" against Appellants "preclud(ing) any possibility of a fair trial." cf. Hill, Fry, Tobin, Bukowski, Levi, Scott. This constant conduct towards defense attorneys undermined Defendants' right to the effective assistance of counsel guaranteed to them by the Sixth Amendment.

Mr. Justice Frankfurter in Offutt points out the effect of the misconduct which so characterizes the record:

"Apparently determined to expedite the trial and avoid erroneous reference to the inadmissible matter by keeping a tight reign on counsel ... the Court defeated its purpose by early embroilment with counsel. The judge's repeated recriminations and displays of temper towards defense counsel could not have helped but prejudice the jury ... if defense counsel act improperly they should be dealt with by sharp reprimand outside of the hearing of the jury ..." United States v. Persico, 305 F. 2d 534, 537, 540 (2nd Cir. 1962).

"He (Judge) ... must take care not to give the jury an impression of partisanship on either side." United States v. DeSisto, 289 F.2d 833-834 (2nd Cir. 1961).

His (trial judge's) behavior precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury. (348 U.S. at 17). (Emphasis added). 9/

9/ Compare the Supreme Court's discussion of the trial atmosphere in Ofutt with the record presently before this Court:

Almost from the outset, a clash between the presiding judge and petitioner became manifest, which, it is fair to say, colored the course of the trial ... and with increasing personal overtones ... these interchanges between court and counsel were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor ... counsel must be protected in the right of an accused to 'fearless, vigorour and effective' advocacy, no matter how unpopular the cause in whch it is employed ... The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law ... the judge should not himself give vent to personal spleen or respond to a personal grievance ... Plainly the Court of Appeals thought there was an infusion of personal animosity ... though under 'provocation' which it concluded 'demonstrated a bias and lack of impartiality. The record discloses not a rare flareup, not a show of evanescent irritation - a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial

Chief Judge Swygert of the 7th Circuit has emphasized the lethal result of a criminal trial of an "unfavorable climate" such as the trial judge generated in the instant case:

> Perhaps no single error occurring outside that climate could be sufficient to require reversal; however, their cumulative effect ... leads inevitably to the conclusion that the defendants were denied a fair trial. United States v. Battaglia, 394 F. 2d 304, 327 (1968) (dissenting opinion).

This record has revealed that the trial judge was from the first moment of the proceedings "an activist seeking combat". Mayberry, Offutt. Because he was "an

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judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two. His behavior precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury. Offutt v. United States, 348 U.S. 11, 12-15 (1954) (Mr. Justice Frankfurter writing for the Court).

activist seeking combat", he could not embody what Mr. Justice Douglas in Mayberry and Mr. Justice Frankfurter in Offutt both describe as essential to the functioning of a system of justice; the image of "the impersonal authority of the law".

In respect to the Petitioners, this distortion of the impartial image of the Court deprived them of their guaranteed right to a fair trial. The consequences for the entire nation are devastating, for as Mr. Justice Jackson has taught us in Krulewitch:

> The most odious of all oppressions are those which mask as justice. (336 U.S. 458).

This Court, as the Supreme Tribunal of the land, has a profound dity to reverse these judgments of conviction. This duty transcends the interests of these Petitioners. It is a duty to the entire administration of justice and to all society.

III

THE ENTIRE RECORD DEMONSTRATES THAT THE PROSECUTING ATTORNEY FAILED IN HIS DUTIES AS THE REPRESENTATIVE OF THE SOVEREIGNTY WHOSE WORDS ARE BELIEVED BY THE AVERAGE JURY AND WAS GUILTY OF PURPOSEFUL AND FLAGRANTLY PREJUDICIAL MISCONDUCT, THEREBY DEPRIVING PETITIONERS OF THEIR RIGHT TO A FAIR TRIAL UNDER THE CONSTITUTION.

The prosecuting attorney in this case failed to heed the command of the Supreme Court clearly set forth in Berger v. United States,[1/] 225 U.S. 78, 88 (1935) that the prime duty of the United States Attorney in criminal prosecutions is not to convict but to see that "justice is done". Mr. Justice

1/ Cited 7th Circuit for this proposition in United States v. Keenan, 267 F.2d 118 (1959).

Sutherland wrote for the Court:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim or which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. (Emphasis added.)

The right of a criminal defendant to a fair prosecutor, insured by the Supreme

in Berger, is a part of the very fabric of American justice. The special role of the prosecutor is stressed in unequivocal language in the Code of Professional Responsibility of THE American Bar Association in Ethical Consideration 7-13 under Canon 7. It says, "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict". As Justice Fortas has forcefully said:

> There is no place in our system of criminal justice for prosecutorial misconduct. Nash v. Illinois, 389 U.S. 906 (1967) (Petition for cer. denied, Justice Fortas dissenting joined by Chief Justice Warren and Douglas.)

In reversing a conviction because a prosecuting attorney failed to meet these high standards, the Court in Hall v. United States (5th Cir. 1969), 419 F.2d 582, 583-4, said that he had "great potential for jury persuasion", that "his role as a spokesman for the government tends to give to what he says the ring of authenticity. The powe

and force of the government tend to impart an implicit stamp of believability to what the prosecutor says" and that in his voice and person "is the unseen presence in the courtroom of our great and powerful government."

The fact that the prosecutor's obligations are different than defense counsel's has long been recognized. In Latham v. United States (5th Cir. 1915) 226 F. 420, the Court stressed that as the prosecutor is a person of considerable influence in the community and the representative of the government this lends "weight and import to his utterances". The Court said:

> He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty. The realization of these considerations should lead the officer to exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his arguments and statements to the testimony of the witnesses, in order that no right of the defendant is violated. (Emphasis added).

In the whole administration of justice

the need of a fair prosecution is second in importance only to the necessity of an impartial judge. As the Fifth Circuit pointed out in Handford v. United States, 249 F 2d 295, 296 (1947):

> ... he (prosecuting attorney) must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important, that Anglo-American criminal law rests on the foundation; better the guilty escape than the innocent suffer. In this case zeal outran fairness. The argument of the United States Attorney in the district court was improper, prejudicial, and constituted reversible error. (Emphasis added).

The record shows that in the instant case rather than meeting the high responsibility imposed upon them, the prosecution along with the trial judge created "an atmosphere of prejudice imperiling dispassionate judgment" Bukowski, supra, and that their misconduct was "of a flagrant nature resulting in a pattern of

prejudicial impropriety." United States v. Achilli, (7th Cir. 1968), 234 F. 2d 409, 414. (See Appendix "B").

V

THE EVIDENCE ADDUCED AT TRIAL WAS TOTALLY INSUFFICIENT TO JUSTIFY THE CONVICTIONS OF ANY OF THE PETITIONERS.

Preface

The evidence presented in the trial is found in the ten or so lengthy volumes of the trial transcript. Counsel for Petitioners' Grancich, Galea and Martinez presented his argument to the jury as to why he felt the evidence was insufficient (See R.T. 2178-2242), on the motions for judgment of acquittal (R.T. 980-1007), and colloquies with the Court before the motion for a new trial (R.T. 2259-2261), the motion for New Trial and In Arrest of Judgment (C.T. 206-215), and the argument on said motions (R.T. 2265-4471). Because of limitations in space and the feeling that the issues were intensely argued, counsel

refers the Court to those sections of the Trial Record and herein encapsulates only the highlights of our objections to the convictions. It would take counsel at least 100 pages to recount the deficiencies in the Government's case as it pertains to each defendant.

A. Petitioner Mike Grancich urges this Court to dismiss the case against him on the grounds that the evidence is insufficient to support the charges.

Grancich, the Secretary-Treasurer for Local 626 of the Teamster's Union, was indicted in Counts 1 through 5. He was acquitted on Count 5, which involved attempting to extort money from Alfred Blea and Richard Rodarte. The jury convicted him on Counts 1 through 4. Again counsel directs this Court to his arguments for the acquittal of Mr. Grancich referred to in the preface.

1. Counts 3 and 4, upon which defendant Mike Grancich was convicted, are not charges of conspiracy. Even if they were, there is

no evidence to support either a conspiracy with Archie Galea vis a vis Gronsky and Goldstein, much less substantive criminal activity. The only evidence adduced was that Defendant Grancich had dinner with Goldstein and Gronsky, at their instigation, and they apparently mildly discussed the picket line put up on their plants by the Retail Clerks Union and honored by the Teamsters, Engineers and Butchers. No suggestion was ever made to Defendant Grancich that money would be paid if he could induce the Retail Clerks Union to remove their pickets or that he ever did that. In fact, Goldstein left the dinner get-together feeling that nothing had been accomplished. Even if Grancich arranged for the picket line to be removed, and there is no evidence, it would not prove the he knew or was involved in any subsequent demand for payment by Defendant Galea, if the Court believes that event transpired. Having dinner and discussing a picket line does not

a conspiracy binding Grancich for any alleged acts of Galea. Besides the crime levelled against Grancich was not even a conspiracy.

2. Not one of the activities accredited to Defendant Grancich occurred after October 15, 1970, and, therefore, neither Count 1 nor Count 2 can stand. (The 9th Circuit Court agreed as to Count 2 and reversed). An attempt to apply the October 15, 1970, legislation to deeds allegedly performed hitherto is clearly ex post facto legislation and Constitutionally invalid.

3. Defendants Grancich and Galea were convicted of violating Counts 3 and 4 of the indictment No. 10638, namely soliciting and accepting payoffs from packers Gronsky and Goldstein. Count 2 of the same indictment (see 5(a)) and 5(b) realleges the same data. Count 1 of the indictment encompasses in more general language the same activity. Since the jury verdict was general, it is not possible to ascertain from the record

whether Defendant Grancich' conviction on Counts 1 and 2 was predicated upon the Gronsky and Goldstein matters or different ones. In the absence of a unanimous jury verdict on the conspiracy charge predicated upon activities wherein there was sufficient proof, both counts cannot stand.

We submit that a special verdict is demanded in all situations wherein an indictment charges a conspiracy to commit more than one substantive offense since it cannot be determined from a general verdict alone whether the jury unanimously agreed on the offense or offenses which the defendant was alleged to have conspired to perpetrate.

Moreover, in the instant case the Government has pleaded the indictment (No. 10638) in such a manner that the verdicts reflect that the invalid convictions of defendants Galea and Grancich on Counts 3 and 4 sufficed to permit convictions on Counts 1 and 2. In Samuel v. United States,

(9th Circuit 1948) 169 F. 2d 787, the conspiracy charge referred to three different substantive laws. The Court reversed the cause holding that from the general verdict it was impossible to ascertain which of the statutes the jury found there was a conspiracy to violate. The same result is compelled here wherein Count 1 alleges a Hobbs Act conspiracy to violate Section 18 U.S.C. 1962(c) or two different violations of 29 U.S.C. 186, (para. a and d), 18 U.S.C. 1951, and either 18 U.S.C. 1503 or 18 U.S.C. 1310.

B. The Evidence was Totally Insufficient to Convict Defendant Galea.

The only viable activities alleged against Defendant Galea appear in Count 1 (para. e) concerning a $500 payment he received from Donald Matthews concerning which there is no evidence and Count 2 (5(d) and (e) which the 9th Circuit reversed.

Finally, in view of the general verdict

of guilty by the jury there is no proof that the jury unanimouly found that Galea engaged in a specified conspiracy and in view of the pleadings an impermissible compromise verdict appears probable (See Grancich argument, supra).

C. The allegations in Indictment No. 11933 against Defendants Archie Galea and Frank Martinez (1) do not state a criminal offence under 18 U.S.C. 1503 (Obstruction of Justice, the charging Statute; (2) Moreover the proof fails to exhibit the commission of the offense. Thus the Court should set aside the judgment of conviction.

1. Defendants Galea and Martinez were charged with and found guilty of corruptly, willfully injuring the property of Robert Dougherty because of his testimony before the Grand Jury on an earlier occasion. If the Defendants committed the act in question it is not rendered criminal under the charging statute, 18 U.S.C. Section 1503. That section is to be strictly construed United States v. Ryan (9th Cir. 1972), 455 F.2d 728. The principle of ejusdem generis

applies, thus the general clause at the end embraces the specifics mentioned in the statute and any omission to cover the fact situation here is a matter for Congressional rather than Judicial redress. Ryan, ibid; see also Haili v. United States (9th Cir. 1958), 260 F.2d 744; United States v. Essex (6th Cir. 1969, 407 F.2d 214. Section 1503 specifically enumerates the organs or parties before whom the victim of property damage must have been a witness and the Grand Jury is not included. In the Ryan case, the 9th Circuit Court of Appeals concluded "In Haili, the Court approved the decision in United States v. Scoratow, 137 F. Supp. 620 (W.D. Pa. 1956), which held that in order to constitute an offense under Section 1503, the act charged must be in relation to a proceeding pending in the federal courts, and that an investigation by the Federal Bureau of Investigation did not constitute a judicial proceeding. "Similarly, an investigation by the Internal

Revenue Service or by any other governmental agency would not constitute a judicial proceeding." Thus the hearing before the Grand Jury, which serves an investigative function, was not a judicial proceeding and consequently the Statute is inapplicable. In Ryan, the Court proceeded to detail various offenses the defendant possibly committed but impeding the Grand Jury in its function was construed as not violative of the statute charged here, to wit, 18 U.S.C. Section 1503. The Court specifically disapproved a jury instruction which envisioned Section 1503 as encompassing endeavors aimed at obstructing Grand Jury functions. Thus, Case No. 11933 CD should be dismissed.

2. In section 303 of the Labor National Relations Act (Taft Hartley Act) 29 U.S.C. Section 187, Congress made certain conduct unlawful and further created a right of action in Federal Court for "whoever shall be injured in his business or property by

reason of any violation (of this section)." Clearly, Congress' intent in Section 187 was to permit recovery of damages for loss of business - or loss of profits - in addition to compensatory damages for physical injuries to "property".

Section 1503 of Title 18 U.S.C., however, refers only to "injuries to property". The conduct in the case at bar, allegedly in violation of Section 1503, can only be interpreted as affecting business losses such as profits. Since such losses are, when threatened, speculative and indefinite, as opposed to the definite threat of injuries to tangible, existing property. Congress' use of the single word "property" in Section 1502 of Title 18 U.S.C. should not be construed to encompass loss of business. Thus, these judgments of convicition should be reversed.

CONCLUSION

For all of the aforegoing reasons, Petitioners urge that the within Petition for Certiorari be granted.

Respectfully submitted,

Luke McKissack

Attorney for Petitioners
Grancich, Galea and
Martinez.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. ENRICO CAMPANALE and DONALD MATTHEWS, *Appellants.*	No. 73-2643 No. 73-2833
UNITED STATES OF AMERICA, *Appellee,* vs. MIKE GRANCICH, ARCHIE GALEA, PETER MACHT, ANTHONY JAYICH, and FRANK MARTINEZ, *Appellants.*	No. 73-2747 No. 73-2865 OPINION

[June 4, 1975]

Appeal from the United States District Court
for the Central District of California

Before: CHAMBERS and HUFSTEDLER, Circuit Judges, and KING,* District Judge.

PER CURIAM:

STATEMENT OF THE CASE

A nine-count indictment returned on June 29, 1972,[1] in the United States District Court for the Central District of California charged appellants and three co-defendants[2] with conspiracy to

*The Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

[1]Indictment No. 10638-CD which superseded an earlier indictment (No. 8283-CD). The earlier indictment did not include Campanale, Grancich, Martinez, or Matthews.

[2]The three co-defendants were acquitted.

conduct a pattern of racketeering activity (Counts 1 and 2) in violation of 18 U.S.C. § 1962(d), and with substantive offenses of requesting and receiving money in violation of 29 U.S.C. § 186 (Counts 3 and 4), obstructing and attempting to obstruct interstate commerce by extortion in violation of 18 U.S.C. § 1951 (Counts 5, 6 and 7), and picketing for personal profit in violation of 29 U.S.C. § 522 (Counts 8 and 9).[3] Another indictment returned on February 13, 1973, just prior to trial[4] charged Galea and Martinez with one count of obstruction of justice through injury to property of Robert Dougherty because of his testimony before a grand jury, in violation of 18 U.S.C. § 1503. The two indictments were consolidated for trial.

The June indictment in Counts 1 and 2 charged two extortion conspiracies in the Vernon, California, area by members of Meat and Provisions Drivers, Teamsters Local 626 (hereinafter "Local 626")[5] and Pronto Loading and Unloading Company (hereinafter "Pronto")[6] to participate in a pattern of racketeering activity. Specifically, Count 1 charged a conspiracy between 1968 and 1972 to conduct a pattern of racketeering activity by intimidating and forcing meat packers to contract for Pronto's services and by extorting money from Ponto's competitors in the unloading business as a condition for continuance in business, and set out seven overt acts of which three occurred after October 15, 1970.[7] Count 2 charged a conspiracy between 1968 and 1972 to conduct a pattern

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[3]Count 1: Campanale, Galea, Grancich, Martinez, Matthews,
Count 2: Chacon, Galea, Grancich, Jayich, Macht, Martinez, Rico,
Count 3: Galea, Grancich,
Count 4: Galea, Grancich,
Count 5: Campanale, Galea, Grancich, Matthews,
Count 6: Campanale, Matthews,
Count 7: Galea,
Count 8: Galea, Jayich, Macht, Rico, Santana,
Count 9: Chacon, Macht, Rico.

[4]Indictment No. 11933-CD.

[5]Appellants Archie Galea, Mike M. Grancich, Anthony Jayich, and Peter Macht.

[6]Appellants Enrico Campanale and Donald Matthews were part owners of Pronto. Campanale was also president.

[7]October 15, 1970, is the effective date of the Organized Crime Control Act of 1970 of which 18 U.S.C. § 1962 is a part. *See* Pub. L. 91-452, Title IX, § 901(a), 84 Stat. 942.

of racketeering activity by extortionate intimidation of meat packers, and set out ten overt acts of which five occurred after October 15, 1970.

Following a jury trial in March 1973, Galea, Grancich, Jayich, and Macht were convicted of the Count 2 conspiracy; Grancich was convicted of the Count 1 conspiracy and of the substantive offenses in Counts 3 and 4; Campanale and Matthews were convicted of the Count 1 conspiracy and of the substantive offenses in Counts 5 and 6; Galea was convicted of the Count 1 conspiracy, the substantive offenses in Counts 3, 4, 5, and 7, and the offense charged in the February indictment; Martinez was convicted of the offense charged in the February indictment.

Campanale and Matthews filed separate notices of appeal (Nos. 73-2643 and 73-2833.) Grancich, Jayich, and Macht (No. 73-2865) and Galea and Martinez (No. 73-2747) filed a joint notice of appeal.[8] All appeals were heard together.

We reverse as to the Count 2 conspiracy and affirm as to all other counts.

ISSUES

Appellants Campanale and Matthews joined in the other appellants' arguments and raised nine issues or errors, as follows:

I. The trial court's denial of their motion for a separate trial.

II. The trial court's denial of their motion for a bill of particulars and to strike surplusage and to dismiss the indictment.

III. The trial court's denial of their motion for a judgment of acquittal.

IV. The trial court's admission of evidence "against Appellants Campanale and Matthews on matters that were not the subject of the indictment against them."

V. The trial court's action in restricting cross-examination and excluding evidence, especially as to the financial condition of employers in the unloading service industry in Vernon, California.

VI. The trial court's instructions, especially with respect to the conspiracy charges.

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[8] All five filed a joint notice of appeal but Grancich, Jayich, and Macht were allowed to file in forma pauperis.

VII. The admission of evidence as to acts occurring prior to October 15, 1970, in support of the conspiracy charges, as a matter of evidentiary law.

VIII. The admission of evidence as to acts occurring prior to October 15, 1970, in support of the conspiracy charges, as a matter of statutory interpretation.

IX. The constitutionality of the Organized Crime Control Act of 1970 if interpreted to permit evidence as to acts occurring prior to October 15, 1970, in support of a conspiracy charge under the statute.

Appellants Galea, Grancich, Jayich, Macht, and Martinez joined in all of the arguments presented by Appellants Campanale and Matthews, and raised four additional issues, as follows:

X. The conduct of the trial judge was such as to deprive appellants of their right to a fair trial.

XI. The prosecuting attorney was guilty of purposeful and flagrantly prejudicial conduct such as to deprive appellants of their right to a fair trial.

XII. The evidence adduced at trial was insufficient to justify any of the convictions.

XIII. 18 U.S.C. § 1503 does not apply to the conduct brought out at the trial.

JAYICH and MACHT

Jayich and Macht were business agents of Local 626. They were found not guilty of any substantive offense, but guilty of the Count 2 conspiracy offense. Also found guilty of the Count 2 conspiracy offense were Chacon and Rico.[9] As to the latter two, the trial judge entered a judgment of acquittal notwithstanding the verdict. We agree with these appellants that their situation was indistinguishable as a matter of law from that of Chacon and Rico.

The government's argument in this regard is notably skimpy. The government's brief states:

> The evidence was also sufficient to convince the jury beyond a reasonable doubt that business agents Jayich and Macht

[9]Edward Chacon was President of Local 626. Charles Rico was a business agent of Local 626.

were members of the Count 2 conspiracy. Once a conspiracy has been clearly established, slight evidence may be sufficient to connect a defendant with the conspiracy. [citing cases].

This "slight evidence" is summarized by the government as follows:

> [On April 2, 1971] Macht prevented Ruchti employees from picking up meat at a packing house and told Ruchti II that he could not do business in California without Grancich's approval. (Tr. 466, 783.) On April 28th, Jayich chased a Ruchti truck and told the driver he would like to work him over (Tr. 785, 816.) On April 28th and 29th Macht made threatening gestures with his fists against Ruchti II and against the son of the owner of the property rented by Ruchti Transport. (Tr. 825, 828.) On May 5th when Galea and Loya tried to break in the door of the Paramount cooler, Macht and Jayich stopped meat deliveries to the cooler (Tr. 794, 799). The evidence, therefore, was sufficient that Jayich and Macht were members of the Count 2 conspiracy.

The April 28th and 29th actions detailed took place in connection with picketing carried on as part of a dispute over wage claims. These picketing activities were the subjects of Counts 8 and 9, respectively, of the June indictment. Those charged in these counts, including Jayich and Macht, were found not guilty. But the April 28th incident was set out as one of the "criminal violations" committed by the defendants in furtherance of the conspiracy—and the only "criminal violation" naming Jayich and Macht (and also Chacon and Rico).

The considerations which led the trial judge to grant a judgment of acquittal *non obstante veredicto* to Chacon and Rico apply with equal force to Jayich and Macht. We find the evidence adduced at the trial to be insufficient to sustain the convictions of Jayich and Macht under Count 2 of the June 29, 1972, indictment.

THE COUNT 2 CONSPIRACY

As to the Count 2 conspiracy itself, the government failed to prove any separate conspiracy.

Although 18 U.S.C. § 1962(c) is rescued from ex post facto invalidity because the statute requires that at least one act of "rack-

eteering activity" occur after the effective date of the statute,[10] no solid evidence exists that any such overt act did occur with reference to the Count 2 conspiracy.

The first series of post-1970 acts on which the government relies are the payments from members of the unloading business to members of the union. The government relies on these same payments to support also the Count 1 conspiracy. This raises a preliminary question whether Counts 1 and 2 charge separate conspiracies, and, if so, what the difference is.

Count 1[11] lists seven crimes committed in furtherance of that conspiracy. Count 2[12] lists six of these same crimes to support that conspiracy. The implication arises that the government is attempting to make two conspiracies out of one so as to increase each defendant's liability. But even when a conspiracy contemplates several crimes, only one conspiracy can be charged and punished.

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[10]See discussion below.

[11]The Count 1 conspiracy charges that the Pronto defendants and the Local 626 members conspired:

> to conduct and, directly and indirectly, participate in the conduct of the affairs of Vernon Loading and Unloading Company, Inc., Pronto Loading and Unloading Company, Inc., and Local 626 through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).
>
> It was a part of the said conspiracy that the defendants would, through harassments and threats of economic loss, intimidate various meat packers and other related businesses for purposes of extorting, receiving and accepting money and other things of value.
>
> It was a further part of the conspiracy that the defendants would, through threats of economic loss, force meat packers to contract for the services of Vernon . . . and Pronto. . . .
>
> It was further part of the conspiracy that the defendants would extort money from some of the competitors of "Vernon" and "Pronto" as a condition to those competitors continuing to operate their business and would force other competitors out of business.

[12]The Count 2 conspiracy charges that the Local 626 defendants conspired:

> to conduct and participate, directly and indirectly, in the conduct of the affairs of Local 626 through a pattern of racketeering activity.
>
> It was a part of the said conspiracy that the defendants would, through harassments and threats of economic loss, intimidate various meat packers and other related businesses for purposes of extorting, receiving and accepting money and other things of value.

Braverman v. United States, 317 U.S. 49 (1942).[13] The conspiracy to take money from the various unloading businesses was a single conspiracy requiring participation in the affairs of both Pronto and Local 626.

Even if one accepts the government's position that there were separate conspiracies—a joint conspiracy between Pronto and Local 626 members to extort payments from unloading companies and a separate conspiracy to extort payments from the meat packers—payments from Pronto to Local 626 cannot support the second conspiracy. Such payments between conspirators are irrelevant to the asserted purpose of the Count 2 conspiracy.

The government also relies on a second group of post-1970 acts to support the Count 2 conspiracy. These acts grew out of a dispute between Local 626 and a Mr. Ruchti, the owner of a meat delivery business. The union claimed that Ruchti owed it money. Galea, Jayich, and Macht attempted to collect this money by picketing and interfering with the movement of Ruchti's trucks. On one occasion, Galea and two helpers attacked one of Richti's meat coolers with a 4"x6" piece of lumber. The government charged these defendants with the substantive crimes of picketing for profit and extortion. All defendants were acquitted of picketing for profit; Galea was convicted of extortion for his attack on the cooler.

The picketing acquittals presumably eliminate those acts from consideration under the conspiracy count. Only the meat cooler attack can be used to support the Count 2 conspiracy. But there is no evidence that this attack was part of a larger conspiracy. In fact, it has an air of spontaneity inconsistent with the long-range conspiracy charged by the government. It was not repeated. The government did not establish any connection between that attack and the alleged program of extortion used on the meat packers before 1970.

The third and final group of acts on which the government relies to show a post-1970 conspiracy comprises alleged attempts by

[13] *Braverman* considered a single conspiracy which violated only the general conspiracy statute, though several substantive crimes were planned. The court held that only one violation had occurred and only one penalty could be imposed. *See also* United States v. Adcock, 487 F.2d 637, 639 (6th Cir. 1973); United States v. Noah, 475 F.2d 688, 693 (9th Cir. 1973); United States v. Tanner, 471 F.2d 128, 141 (7th Cir. 1972).

Grancich and Martinez to obstruct the racketeering investigation by intimidating and punishing a key witness. There is very little evidence that these acts were part of any conspiracy. The government claims that Grancich threatened the witness in violation of 18 U.S.C. §1510, but Grancich was not charged with a substantive violation of that statute. The government claims that Martinez tried to ruin the witness' business. For these efforts Martinez was charged and found guilty of a substantive violation of 18 U.S.C. § 1503; but he was acquitted on the conspiracy charge. The jury thus could not have considered these acts by Martinez to have been in furtherance of the Count 2 conspiracy. Moreover, because the witness in question was a partner in Pronto, he had much testimony to offer about the plan to extort payments from other unloading companies, but none to offer about extortion of the meat packers.[14] Silencing such a witness might arguably be in furtherance of the Count 1 conspiracy, but hardly of the Count 2 conspiracy.

The government's use of the acts relating to obstruction of justice is subject to another objection. There is no evidence that the original Count 2 conspiracy, if it existed, included a plan to obstruct justice. The government claims that the jury could have inferred that a coverup was a part of this alleged conspiracy.[15] However, the Supreme Court has condemned the use of an inferred coverup conspiracy to extend a conspirator's period of liability. *Grunewald v. United States,* 353 U.S. 491 (1957).[16]

For the foregoing reasons, we conclude that there was insufficient evidence as a matter of law to support the convictions of Galea, Grancich, Jayich, and Macht under Count 2 of the June 29, 1972, indictment.

THE CONDUCT OF THE TRIAL

ISSUES I and II:

RULINGS ON MOTIONS DIRECTED TO INDICTMENT

Motions for severance are not unusual when multiple defendants are charged variously in multiple counts in the same indictment.

[14]Tr. 288-289; Brief of Appellee United States at 25.

[15]Brief of Appellee United States at 50.

[16]*See* Krulewitch v. United States, 336 U.S. 440 (1949).

When one or more conspiracy counts are joined with one or more substantive counts, the indictment should be, and usually is, examined carefully by the trial judge to determine whether or not justice requires a separate trial as to any defendant or as to any count. The record reveals that the trial judge in this case did make such an examination and determination and denied the motions for separate trials.

The granting or denial of a severance under Rule 14, Fed. R. Crim. P., is a matter within the trial court's discretion and reversal is appropriate only if abuse of that discretion has been shown. *Schaffer v. United States,* 362 U.S. 511 (1960); *Parker v. United States,* 404 F.2d 1193 (9th Cir. 1968), *cert. denied,* 394 U.S. 1004 (1969).

The test is whether a joint trial was so prejudicial to a defendant as to require the exercise of the trial judge's discretion in only one way, that is, by ordering a separate trial. *United States v. Thomas,* 453 F.2d 141 (9th Cir. 1971), *cert. denied,* 405 U.S. 1069 (1972).

The burden of demonstrating prejudice is a difficult one, and the ruling of the trial judge will rarely be disturbed on review. *Tillman v. United States,* 406 F.2d 930, 934 (5th Cir. 1969), citing 8 J. MOORE, FEDERAL PRACTICE ¶ 14.02 [1] (2d ed. 1968); *United States v. De Sapio,* 435 F.2d 272 (2d Cir. 1970). The defendant must show more than the fact that a separate trial might offer him a better chance of acquittal. *Tillman, supra.*

The ultimate question is whether under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. *Peterson v. United States,* 344 F.2d 419 (5th Cir. 1965) citing with approval *United States v. Kahaner,* 203 F.Supp. 78 (S.D. N.Y. 1962), *aff'd,* 317 F.2d 459 (2d Cir. 1963), *cert. denied,* 375 U.S. 836 (1963).

Appellants do not, and could not successfully, claim that there is a misjoinder of offenses or defendants under Rule 8, Fed. R. Crim. P. All appellants were alleged to have participated in the same underlying pattern of racketeering. The factual issues were not complex.

There is no problem here of a co-defendant's extra-judicial statement, as in *Bruton v. United States*, 391 U.S. 123 (1968).

The jury did in fact distinguish among the defendants, finding some not guilty, others not guilty of one or more offenses but guilty of others.

Appellants have failed to demonstrate any prejudice that would outweigh the benefit afforded to efficient judicial administration by a single trial. *See United States v. Garrison*, 348 F.Supp. 1112 (E.D. La. 1972).

The argument for striking "surplusage" from the indictment is groundless. Appellants' interpretation of the meaning and effect of the allegations in question is not reasonable.[17] The language in

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[17]Appellants sought to strike lines 1-5 on page 3 and paragraphs (f) and (g) on page 5 of the June indictment. These allegations are part of Count 1 and read as follows:

> It was a part of the said conspiracy that the defendants would, through harassments and threats of economic loss, intimidate various meat packers and other related businesses for purposes of extorting, receiving and accepting money and other things of value.

And among the overt acts alleged, as criminal violations:

> (f) On or about the nineteenth of May 1972, the defendant Mike M. Grancich, by misrepresentation and intimidation willfully endeavored to delay and prevent the communication of information relative to violations of the above criminal offenses by Robert Dougherty to federal criminal investigators, in violation of 18 U.S.C. § 1503.
>
> (g) On or about the twenty-six day of May 1972, the defendant Frank Martinez did willfully and knowingly corruptly endeavor to influence Robert Dougherty, known to said defendant to have been a witness before a federal grand jury convened and sitting in the Central District of California, in that defendant Frank Martinez threatened to impose reprisals upon the said Robert Dougherty should the said Robert Dougherty testify against the defendant Mike M. Grancich at any forthcoming trial, in violation of 18 U.S.C. § 1510.

Appellants Campanale and Matthews read these allegations as imputing to them the use of violence and an agreement to obstruct justice. They admit that "in form the Appellants were *excluded* from evidence of violence." Opening Brief for Appellants Campanale and Matthews at 19. It is hornbook law that co-conspirators need not agree to the overt acts of other co-conspirators, only that the overt acts must be in furtherance of the conspiracy. *See* Blumenthal v. United States, 158 F.2d 883 (9th Cir. 1947), *aff'd* 332 U.S. 539 (1947).

question properly set out legal essentials of the charge. *See United States v. Root*, 366 F.2d 377 (9th Cir. 1966), *cert. denied*, 386 U.S. 912 (1967). That the jury was not confused was demonstrated by the not guilty verdict returned as to Martinez, who is the person named in paragraph (g) of Count 1 as having used threats against a grand jury witness. The same jury found Martinez guilty of the substantive offense of obstruction of justice.

ISSUES IV, V and VII:

RULINGS ON ADMISSION AND EXCLUSION OF EVIDENCE

Appellants' dissatisfaction with the trial judge's rulings on the admission and exclusion of evidence is unjustified.

Appellants put forth the proposition that in a jury trial of a federal indictment charging federal offenses in a federal court in California, California law on admission and exclusion of evidence is applicable as Congress has not adopted the proposed Federal Rules of Evidence.[18] Whatever the applicable principles may be under Fed. R. Civ. P. 43(a), the plain language of Fed. R. Crim. P. 26 states:

> . . . The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

See Funk v. United States, 290 U.S. 371 (1933); *Wolfle v. United States*, 291 U.S. 7 (1934); *United States v. Woodall*, 438 F.2d 1317 (5th Cir. 1970) *(en banc), cert. denied*, 403 U.S. 933.[19] We have nevertheless, reviewed the specific rulings cited by appellants and find nothing serious enough to require consideration as a basis for reversal.

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[18]Opening Brief for Appellants Campanale and Matthews at 37 n. 1. Federal Rules of Evidence were adopted by Act of January 2, 1975, Pub. L. 93-595, ... Stat. ....., effective "on the one hundred and eightieth day beginning after the enactment of this Act."

[19]Appellants cite no California cases and only one federal case to support their evidentiary complaints.

Evidence as to acts occurring prior to October 15, 1970, in support of the conspiracy charges was clearly proper as a matter of evidentiary law.[20] *See United States v. Pauldino*, 443 F.2d 1108 (10th Cir. 1971), *cert. denied*, 404 U.S. 882 (1971).

ISSUES X and XI:

TRIAL JUDGE'S BIAS AND PROSECUTORIAL MISCONDUCT

Appellants attempt to bring the trial judge's actions within the principles of *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), *reaffirming Offutt v. United States*, 348 U.S. 11 (1954), and to bring the prosecuting attorney's actions within the principles of *Berger v. United States*, 295 U.S. 78 (1935).

The actions of the trial judge which are said to show reversible bias and partiality are set forth in Appendix A to the Opening Brief of Appellants Grancich et al.[21] Most of the itemizations relate either to evidentiary rulings unfavorable to the defense or to questionings of witnesses by the judge or to exchanges between judge and counsel in which the judge appeared to be impatient or annoyed. We have reviewed the record from the point of view of the overall impact of the judge's conduct. We conclude that appellants' characterization of the situation is overly dramatic.

Many of appellants' itemizations relate to the picketing involving Ruchti Transport Co. Yet those charged with illegal picketing for personal profit were found not guilty.[22] In other areas, the trial judge's questioning of witnesses was "not so egregious as substantially to prejudice the appellant[s], especially in light of the overwhelming evidence against" them. *Cf. United States v. Tramontana*, 460 F.2d 464 (2d Cir. 1972).

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[20]See below as to the constitutionality of the Organized Crime Control Act of 1970.

[21]Appellants rely in part on United States v. Ryan, 455 F.2d 728 (9th Cir. 1972), as raising an inference that the trial judge in this case has previously been criticized for improper conduct of a trial. That case falls far short of demonstrating "this Court's past efforts to deter" the trial judge from "egregious errors" of the sort complained of by appellants.

[22]Count: 8 Galea, Jayich, Macht, Rico, Santana,
Count 9: Chacon, Macht, Rico.

Appellants cite as the "most unbelievable event in the entire trial" the expectation by the trial judge that the defense would proceed as soon as the prosecution rested.[23] The argument seems to be that the defense was forced to proceed at a time when it was not reasonable to so require with the result that appellants were denied a fair trial.[24] Assuming that under some circumstances the tempo of a trial might result in prejudice to the defense, the record here fails to sustain appellants' claims of improper judicial action.[25]

Appellants claim to have been surprised that the government rested its case Friday morning after two and one half days of trial. Two of defense counsel proceeded with their opening statements under protest, claiming not to be ready.[26] Yet several witnesses had been subpoenaed by the defense and were available to testify, and in fact the defense put on ten witnesses between 2:00 p.m. and 5:30 p.m. when court was adjourned until Monday morning at 9:30 a.m.

The specifics of the claimed prosecutorial misconduct are supposedly set forth in Appendix B to the Opening Brief of Appellants Grancich et al. The lack of anything concrete in this one page appendix leaves this court nothing upon which to rule.[27]

Appellants were not denied a fair trial.

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[23]Opening Brief of Appellants Grancich et al. at 15A.

[24]The complaint seems misplaced as a supposed example of *Mayberry* or *Offutt* judicial misconduct. Appellants imply, without any justification, some sort of concerted action by judge and prosecutor.

[25]Appellants' overly dramatic recitation of selected events cast doubts on the sincerity of the specification of this issue.

[26]Opening statements on behalf of defendants were reserved after the opening statement on behalf of the government. Far from being pressured into early opening statements, appellants' counsel had an additional three days to prepare.

[27]See n. 18. The general claim is set forth in the following sentence: **. . . to elaborate at length upon the Government's synchronized collusion with the trial court to present whimsical objections to valid and badly needed testimony by the defense, to itemize the efforts made by the prosecution to mislead the court or join it in attempting to rule inadmissible and keep from the jury the vitals of the defense case, and the unequalled effort by the government to represent that it was still presenting its case and upon entry into the courtroom smugly rest with a cheshire grin, would require the writing of a textbook.**

ISSUE VI:

INSTRUCTIONS TO THE JURY

Appellants' grounds for reversal because of the alleged prejudice arising from a joint trial included the argument that even if prejudicial confusion could be avoided by appropriate instructions, necessary cautionary instructions were in fact not given.[28]

Instructions are not a substitute for argument to the jury. If the judge fairly instructs the jury as to applicable principles of law so as to allow counsel on each side sufficient latitude to argue what he considers to be key points in his case, the trial judge has performed his duty. It is neither required nor appropriate for the judge to accentuate any particular legal principle.

Nevertheless, in light of the disposition herein of the Count 2 conspiracy charge, these arguments become academic.

Appellants place special emphasis on the refusal of the judge to give cautionary instructions on the statements of co-conspirators at the time evidence was admitted. This subject was covered at the conclusion of the trial. Tr. Vol. A31. There was no prejudicial error in the judge's failure to give such an instruction also on other occasions during the trial.[29]

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[28]Appellants claim that the trial judge "did not instruct the Jury, insofar as we can determine, on the elements of multiple conspiracy, nor delineate, in any manner, the distinction between Alleged Conspiracy I and Alleged Conspiracy II" [Opening Brief for Appellants Campanale and Matthews at 42] and again that at "the end of the trial the Judge explained the general rules on conspiracy but did *not* instruct the jury to separate the evidence in Count One . . . from Count Two . . ." [Closing Brief for Appellants Campanale and Matthews at 19].

[29]Appellants claim that the "Court refused Appellants' request for such instruction, on the ground that it would be given at the end of the trial." The implication is that the request was made with respect to the testimony of Ruchti and Dougherty at the time that they testified for the government. We have examined the transcript of the testimony of these two witnesses and have been unable to find any timely request by any defense counsel for a cautionary instruction as to the testimony of a co-conspirator. A reference to the page and line of the transcript where this request appears would have been helpful.

Other claimed errors relate to the refusal of the judge to give certain specific instructions requested by appellants.[30] The matters requested were adequately covered in the instructions actually given.

THE SUFFICIENCY OF THE EVIDENCE (OTHER THAN THE COUNT 2 CONSPIRACY)

ISSUES III and XII: DENIAL OF MOTIONS FOR JUDGMENTS OF ACQUITTAL

Appellants argue that the evidence adduced was not sufficient to sustain the verdicts.[31] The trial judge agreed as to defendants Chacon and Rico. We agree as to Appellants Jayich and Macht and as to the Count 2 conspiracy charge generally. As to the other defendants and counts, the evidence was clearly sufficient.

Witnesses for the government gave evidence supporting all of the essential elements of the charges. The defense was either to explain away the damaging evidence as relating to non-criminal activities, or to contradict the government's witnesses. For example, witness Dougherty testified to payments to defendant Galea in cash extorted by Galea from a company with which Dougherty was associated. Galea denied receiving any such payments.

Appellants concentrate on the evidence relating to the conspiracy charges. As already stated, we agree that the evidence was insufficient to support the Count 2 conspiracy convictions. Galea and Granelch from among the union officials and Campanale and Matthews from the corporate members of Pronto were found guilty of the Count 1 conspiracy, and the testimony of Doughtery alone, if believed by the jury, would support that charge.

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[30] Devitt and Blackmar § 11.14, § 12.02 to § 12.04, § 62.04 to § 62.09; and certain special instructions. Opening Brief for Appellants Campanale and Matthews at 43. But the judge did give § 62.09 and § 12.04 (except for the last sentence) *in haec verba*.

[31] Other grounds for the motions for judgment of acquittal are discussed below. As to the Count 2 conspiracy, see the discussion earlier in this opinion.

THE ORGANIZED CRIME CONTROL ACT OF 1970

ISSUES VIII and IX:

INTERPRETATION AND CONSTITUTIONALITY

Much of appellants' arguments relating to evidentiary rulings and the sufficiency of the evidence revolve about the interpretation and constitutionality of the Organized Crime Control Act of 1970.

Appellants contend that the statute requires a showing that those charged thereunder are engaged in "organized crime," that the statute is vague and ambiguous and does not adequately describe the offenses that are prosecuted, that the statute is not intended to apply to acts occurring prior to its effective date of October 15, 1970, and that if so interpreted the statute is *ex post facto* legislation and therefore unconstitutional.

There is no doubt that Congress was concerned with organized crime in passing this amendment to the Hobbs Act. The official short title of the statute evidences this concern. But quite obviously Congress focused on some of the kinds of activities by which individuals and associations engaged in organized crime maintained their income or influence. The statute, 18 U.S.C. § 1962, makes unlawful such activities no matter who engages therein.

While the prohibitions of this section extend to "any person," which includes "any individual or entity capable of holding a legal or beneficial interest in property" (18 U.S.C. § 1961(3)), there are overtones of involvement in organized crime in the several subsections.[32] Subsection (a) refers to "any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt in which

[32] As stated in the report to the Senate of the Senate Judiciary Committee on S. 30, the proposed Organized Crime Control Act of 1970:

> The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern. S. Rep. 91-617, 91st Cong. 1st Sess. p. 158.

such person has participated as a principal." Subsections (b) and (c) require the prohibited activity to be accomplished "through a pattern of racketeering activity or through collection of an unlawful debt". The two conspiracies charged here pursuant to subsection (d) were alleged to be for the purpose of violating subsection (c). Thus, it was a part of the government's proof that each conspiracy was formed for the purpose of conducting or participating, directly or indirectly, in the conduct of Local 626's or Pronto's affairs "through a pattern of racketeering activity".[33]

By definition, also, a "pattern of racketeering activity" requires "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity". 18 U.S.C. § 1961(5).

The words of the statute are general. They contain no restriction to particular persons. *See United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

For similar reasons, appellants' contention that the statute does not apply to a "small business enterprise" such as Pronto is without merit. *See United States v. Pauldino*, 443 F.2d 1108 (10th Cir. 1971).

With respect to the argument that this statute is vague and ambiguous, it is true that, if undefined, terms such as "pattern of racketeering activity" would be unmanageable. Any ambiguity is cured by 18 U.S.C. § 1961, which defines "racketeering activity" with reference to specific offenses, "pattern of racketeering activity" with reference to a definite number of acts of "racketeering activity" within specified time periods, and "enterprise" and "person" with standard language of established meaning. The concept of affecting interstate or foreign commerce is so well imbedded in federal law as not to mislead anyone who desires to conform his conduct to the requirements of this law. *See United States v. Kramer*, 355 F.2d 891 (7th Cir. 1966), *cert. denied in part and granted in part*, 384 U.S. 100 (1966); *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

[33]An element of each conspiracy offense which was amply supported by the evidence adduced as to the Count 1 conspiracy but not as to the Count 2 conspiracy.

As a matter of statutory interpretation, the statute clearly relies upon acts which might have taken place prior to the effective date of the statute of October 15, 1970. The Senate Judiciary Committee in its report to the Senate on this proposed law stated:

> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against *ex post facto laws*, and bills of attainder. Anyone who has engaged in the prohibited activities before the effective date of the legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter. S. Rept. 91-167, 91st Cong., 1st Sess. p. 158.

The speculation that by relying to any extent on acts prior to its effective date the statute risks contravening the prohibitions of U. S. CONST. art. I, § 9, cl. 3, against the passage of bills of attainder or *ex post facto* laws is not unreasonable. The same thought occurred to Congress, and the statute was drafted so as to avoid this possible unconstitutionality.[34] This was done by defining "pattern of racketeering activity" to require one act of racketeering activity after the effective date of the chapter. 18 U.S.C. § 1961(5).

The success of this approach in complying with constitutional constraints has been judicially acknowledged in other contexts.

In *United States v. Wechsler*, 392 F.2d 344 (4th Cir. 1968), *cert. denied*, 392 U.S. 932 (1968), acts carrying out the objectives of a bribe were held violative of 18 U.S.C. § 1952 even though the statute was enacted after the bribe was tendered and received but before the performance of the act for which the bribe was given. The same statute was applied to a federally innocent plan formed

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[34] As stated in the Senate Judiciary Committee's report to the Senate on this proposed statute:

> The concept "pattern" is thought to provide no due process constitutional barrier to criminal sanctions, as a "racketeering activity," defined above, must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute. *See United States v. Nardello*, 393 U.S. 286 (1969).
>
> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws, and bills of attainder. . . . S. Rep. 91-617, 91st Cong. 1st Sess. p. 158.

a year or more before enactment of the law which converted the plan into an unlawful conspiracy, but only if acts in furtherance of the plan and in affirmance of it were committed by the defendants thereafter. *United States v. Kubacki*, 237 F.Supp. 638 (E.D. Pa. 1965). In *United States v. Garrison*, 348 F.Supp. 1112 (E.D. La. 1972), the court relied on these authorities to conclude that 18 U.S.C. § 1511, another section enacted by the Organized Crime Control Act of 1970, had no *ex post facto* infirmity although acts prior to the effective date of the statute were used in the indictment and in evidence to show the existence of a continuing conspiracy. It is well established that a statute increasing a penalty with respect to a criminal conspiracy which commenced prior to, but was continued beyond the effective date of the statute, is not *ex post facto* as to that crime. *Leryas v. United States*, 371 F.2d 714 (9th Cir. 1967); *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964). *Cf. United States v. Witt*, 215 F.2d 580 (2d Cir. 1954), *cert. denied*, 348 U.S. 887 (1954).[35]

As stated by the government, appellants were not convicted of conspiracy under 18 U.S.C. § 1962(d) for acts committed prior to October 15, 1970; rather they were convicted for having performed post-October 15, 1970, acts in furtherance of their continued racketeering conspiracy after being put on notice that these subsequent acts would combine with prior racketeering acts to produce the racketeering pattern against which this section is directed. Brief for the United States at 39.[36]

INDICTMENT No. 11933-CD

ISSUE XIII:

APPLICABILITY OF 18 U.S.C. § 1503

Appellants Galea and Martinez argue that their convictions of obstruction of justice in violation of 18 U.S.C. § 1503 under Indictment No. 11933-CD should be set aside because the statute has no

[35]Appellants do not cite any authorities in support of their argument other than U. S. CONST. art. I, § 9 cl. 3.

[36]The acts constituting racketeering activity must themselves be criminal offenses. 18 U.S.C. § 1961(1). The penalties imposed under 18 U.S.C. § 1962 are no greater than the penalties imposed for many of the substantive offenses constituting racketeering activity for purposes of 18 U.S.C. Chap. 96.

application to the proceedings of a grand jury and because bringing about a business loss is not an injury to property within the meaning of the statute.[37]

Appellants rely on *United States v. Ryan*, 455 F.2d 728 (9th Cir. 1972) for the proposition that federal grand jury witnesses are not within the class of persons protected by 18 U.S.C. § 1503. But *Ryan* is an entirely different case. There the offense was alleged to be destruction or alteration of records called for by a grand jury, yet there was no showing that the records were relevant to the grand jury's inquiry. The court also found that specific intent to impede the administration of justice is an essential element of the offense which had not been established beyond a reasonable doubt.

The court in *Ryan* assumed the applicability of 18 U.S.C. § 1503 to grand jury proceedings, as did the court in *Shimon v. United States*, 352 F.2d 449 (D.C. Cir. 1965), in *United States v. Kahn*, 366 F.2d 259 (2d Cir. 1966), *cert. denied*, 385 U.S. 948 (1966), and in *United States v. Bradwell*, 388 F.2d 619 (2d Cir. 1968), *cert. denied*, 393 U.S. 867 (1968). The grand jury is an appendage of the court. *See Brown v. United States*, 359 U.S. 41 (1959)

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[37]18 U.S.C. § 1503 reads as follows:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(reversed on other grounds in *Harris v. United States*, 382 U.S. 162 (1965). The appellants' interpretation of the statute is at best somewhat strained. In our opinion, the statute clearly protects witnesses before grand juries.

The argument that injury to a witness "in his person or property" does not include forcing the witness out of his business is without merit. *Cf. Miller v. Hulsey*, 347 F.Supp. 192 (E.D. Ark. 1972).

CONCLUSION

Judgments as to appellants Galea, Grancich, Jayich, and Macht, with respect to the Count 2 conspiracy are reversed.

Judgments as to appellants Campanale, Galea, Grancich, Martinez, and Matthews with respect to other counts are affirmed.

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U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, vs. ENRICO CAMPANALE and DONALD MATTHEWS, Appellants.	No. 73-2643 No. 73-2833
UNITED STATES OF AMERICA, Appellee, vs. MIKE GRANCICH, ARCHIE GALEA, PETER MACHT, ANTHONY JAYICH, and FRANK MARTINEZ, Appellants.	No. 73-2747 No. 73-2865 O R D E R

Before: CHAMBERS and HUFSTEDLER, Circuit Judges, and KING,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-5381

MIKE GRANCICH, ARCHIE GALEA,
and FRANK MARTINEZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

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